SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1403

EDWARD BRUSKE,

Petitioner,

vs.

JUDITH A. ARNOLD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

To the Honorable ~~William~~ Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Edward Bruske, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Illinois rendered in these proceedings on November 26, 1969.

OPINIONS BELOW.

The opinion of the Appellate Court, Third District, of the State of Illinois, reported at 100 Ill. App. 2d 428; 241 N. E. 2d 191 (October 23, 1968), appears at Appendix A, *infra*, pp. A1 to A6. The opinion of the Supreme Court of the State of Illinois, reported at 44 Ill. 2d 132, 254 N. E. 2d 453

(November 26, 1969), appears at Appendix B, *infra* pp. A7 to A12. The Supreme Court of the State of Illinois denied a Petition For Rehearing on January 26, 1970, without opinion, Appendix C, p. A13, *infra*.

JURISDICTION

The judgment of the Supreme Court of the State of Illinois was entered on November 26, 1969. See Appendix B, p. A6, *infra*. A Petition for Rehearing was duly filed and the Supreme Court of the State of Illinois denied the same on January 26, 1970, without opinion. See Appendix C, p. A13, *infra*. This petition for certiorari was filed less than 90 days from the date of the order denying the Petition for Rehearing aforesaid. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the Supreme Court of the State of Illinois, in interpreting and applying its own rules (which have the force of statutory law in Illinois) in such manner as to bar the plaintiff in a civil case from cross-examining and impeaching the defendant, as appears more fully below, violated the Fourteenth Amendment to the United States Constitution

   (a) by being inconsistent with due process of law;

   (b) by denying the plaintiff equal protection of the laws;

   (c) by, in effect, depriving the plaintiff of trial by jury, as guaranteed by Article II, Section 5 of the Constitution of the State of Illinois;

   (d) by enforcing a rule of court, having the force and effect of statutory law, in such manner as to abridge the privileges and immunities of a citizen of the United States.

2. Whether the Supreme Court of the State of Illinois by approving direct appeals to the bias and prejudice of the jury in the most flagrant and direct manner and in ignoring all prior contrary precedent of courts of review of the State of Illinois, has denied to your petitioner the protection granted by the Fourteenth Amendment to the Constitution of the United States

(a) by denying your petitioner due process of the law;

(b) by denying petitioner equal protection of the laws;

(c) by, in effect, depriving petitioner of trial by jury, as guaranteed by Article II, Section 5 of the Illinois Constitution;

(d) by abridging the privileges and immunities of a citizen of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment:

"No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws."

Constitution of the State of Illinois,

Article II, Section 2:

"No person shall be deprived of life, liberty or property, without due process of law."

Article II, Section 5:

"The right of trial by jury as heretofore enjoyed, shall remain inviolate . . ."

STATEMENT OF FACTS.

(Pertinent excerpts from the record, which your petitioner believes necessary or helpful in considering this petition are included in Appendix D, pp. A14 to A32, *infra.*)

Petitioner, Edward Bruske, while a pedestrian, was run down by an automobile operated by the respondent, Judith A. Arnold.

The petitioner filed suit against the respondent. Approximately six months before the trial, the respondent voluntarily made statements concerning material issues in the case, which were directly contrary to her testimony at the trial. Appendix D, pp. A14 to A22.) These issues went to the heart of the case and the position taken by the respondent at the trial vehemently *denied facts admitted* in her prior statement.

The trial court granted respondent's motion *to suppress* the prior statement *for all purposes including impeachment.* Accordingly, respondent took the stand and testified in her own behalf, *directly contrary* to her prior statement. Petitioner was *not allowed to cross-examine,* concerning the prior statement. The jury was kept in complete ignorance of its existence.

Throughout respondent's closing argument, respondent's attorney repeatedly appealed to the bias and prejudice of the jury.

> ". . . put yourself in this position here . . ." "Now, put yourself in the position of Judith here who almost had a mental block . . ."
>
> "*Let me ask you, how would you like to be a litigant in a law suit and have John Doe say to you whether or not you were on trial for your life or involved in a personal injury to have the other opposing counsel go to that person and say to them, 'Don't talk to them. Don't tell them anything. Don't go to them at all—'* "
>
> "Mr. Ozmon: Your Honor, I object to this, improper Argument."

Throughout his closing argument, the defendant's attorney constantly asked the jurors to put themselves in the place of the defendant. Examples are the following, among others:

He asked the jury to put themselves in the defendant's place as she was driving down the street.

He asked the jury if there was anything the defendant did or didn't do or should have done, that the jurors could have done to avoid the accident.

Defendant's Counsel, in his closing argument, proceeded to tell the jury that the plaintiff's attorneys wanted to pervert the testimony of witnesses but that the witnesses did not want to pervert their testimony; that plaintiff's attorneys had asked witnesses not to talk to defendant's attorneys. That he (defendant's attorney) thought it was particularly significant that the plaintiff gave or tried to give the jury as distorted view of the picture of the accident. That the plaintiff's case was characterized by falsehood and perversion of testimony. That plaintiff tried to have witnesses testify falsely. That the plaintiff was attempting to hide evidence.

Defendant's attorney proceeded to tell the jury what his long experience had taught him what proper conduct was in the trial of cases and why his experience told him the defendant was telling the truth.

In his closing argument, the attorney for the defendant repeatedly and directly contradicted the actual evidence and testimony of disinterested witnesses as well as the plaintiff, concerning material issues in the case. This conduct was repeated time and again throughout the closing argument. Counsel's contradiction of the evidence was directed at vital issues and were calculated to mislead the jury into believing that the evidence was other than that actually given. (See Appendix D, pp. A22-A32.)

(Examples of respondent's attorney's flagrantly prejudicial conduct and excerpts from the record indicating that such conduct was wholly without basis, merit or excuse are contained in Appendix D, pp. A22 to A32.)

The trial court consistently refused to sustain objections to counsel's conduct or to caution counsel to cease or to caution the jury to disregard the same.

The jury returned a verdict in favor of the respondent, which was upheld by the Appellate Court and Supreme Court of Illinois.

Your petitioner raised timely objections in the trial court to respondent's motion to suppress her prior statement and to other conduct complained of. The petitioner again assigned these matters as error in his appeals to the Appellate Court and Supreme Court of the State of Illinois.

On December 17, 1969, the petitioner filed a Petition for Rehearing in the Supreme Court of Illinois explicity setting forth the Constitutional grounds herein relied upon, which Petition for Rehearing was denied without opinion. (Appendix C, p. A13, *infra*) by the Supreme Court of the State of Illinois on January 26, 1970.

REASONS FOR GRANTING THE WRIT.

I.

To the best of our knowledge the United States Supreme Court has never passed upon the constitutionality of those aspects of trial procedure in civil cases presented in this petition. Although the right to cross-examine witnesses, the right to receive a trial free of bias, passion and prejudice; the right of litigants to have their cases fairly heard and the issues justly determined by a jury; and the right to equal protection and the enjoyment of universally recognized privileges and immunities are inherent to both parties in every civil trial throughout the United States, this Court has, we believe, never presented any guidelines and has

never considered the constitutional aspects of the right to cross-examine adverse parties in civil cases or the right to have one's case presented to a jury free of limitless, unbridled and flagrantly prejudicial argument, unreprimanded and unimpeded by the trial court.

The result of the apparent neglect of the United States Supreme Court to pass upon these issues has been the deprivation of fundamental rights to litigants by a laxity of the state court system in upholding and enforcing fundamental constitutional rights, confident in the knowledge that they will not be reviewed by the United States Supreme Court.

> "The idea of procedural due process is reflected in the statement that it is a rule as old as the law that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity lacks all the attributes of a judicial determination; it is judicial usurpation and oppression and can never be upheld where justice is fairly administered." 16 Am. Jur. 2d, page 942.
>
> "The United States Supreme Court has never attempted to define with precision the words 'due process of law,' and in fact the phrase probably never can be defined so as to draw a clear and distinct line, applicable to all cases, between proceedings which constitute due process of law and those which do not, because the definition in each case depends not so much upon the quality of the act as upon the relation of the particular law authorizing it to the fundamental law which limits the power of the legislature.
>
> "It has been said that the term 'due process of law' asserts a fundamental principle of justice, rather than a specific rule of law, and thus is not susceptible of more than a general statement of its intent and meaning, which are ascertained in the history of its specific applications to cases requiring judicial decision. Rep-

> resenting as it does a living principle, due process is not confined within a permanent catalog of what may at a given time be deemed the limits or essentials of fundamental rights." 16 Am. Jur. 2d, page 937.

We respectfully submit that unless the United States Supreme Court now, after many years, does not grant some specific guidelines and some specific definition as to the questions presented in this petition, that "fundamental fairness" guaranteed by the United States Constitution may frequently be nothing more than a mere platitude in the administration of justice throughout the 50 states of the Union.

II.

The Supreme Court of the State of Illinois, in interpreting and applying its own rules (which have the force of statutory law in Illinois) in such manner as to bar the plaintiff in this civil case from cross-examining the defendant on crucial issues previously testified to by the defendant on her own behalf, violated the Fourteenth Amendment to the United States Constitution (a) by being inconsistent with due process of law; (b) by denying the plaintiff equal protection of the law; (c) by, in effect depriving plaintiff of trial by jury, as guaranteed by Article II, Section 5 of the Constitution of the State of Illinois; and (d) by enforcing a rule of court, having the force and effect of statutory law, in such manner as to abridge the privileges and immunities of citizens of the United States.

The Illinois Supreme Court in holding that the petitioner may not impeach the respondent's testimony at the trial by means of prior diametrically contradictory statements on material issues is encouraging and promotive to the progress and advancement of perjury and concealment and will derogate and impair justice and the ascertainment of truth in civil litigation. The Illinois Supreme Court has

completely ignored all of the precedents from other jurisdictions (Federal and State) as well as the precedents of the State of Illinois. Not only was the defendant enabled to insulate herself from the truth seeking processes and to hide from the jury the fact that the defendant had previously contradicted her testimony in a diametrically opposite manner on every material issue in the case but defendant's attorney was allowed to capitalize upon the suppression of this material evidence and to argue to the jury that defendant was all the more trustworthy because she had not been contradicted.

In the case of *Greene* v. *McElroy*, 360 U. S. 474 (1959) this Court held that the right to cross-examine witnesses was an immutable principle of our jurisprudence, stating that this right is most important where the evidence consists of testimony of individuals whose memory might be faulty or who might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. This Court recognized that the right to cross-examination is of fundamental importance, quoting from Professor Wigmore, at page 497 of the opinion:

> "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination, as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength and lengthening experience."

In *Pointer* v. *Texas*, 380 U. S. 400 (1965) this Court held that the right to cross-examine witnesses in criminal cases was made applicable to the States via the Fourteenth Amendment to the United States Constitution, stating at page 404:

> "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of law suits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case."

The opinion in the *Pointer* case noted with approval the opinion of Mr. Justice Stone, writing for the court in *Alford* v. *United States*, 282 U. S. 687, 692, declaring that the right of cross-examination is "one of the safeguards essential to a fair trial" and again at page 405, stating:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guaranty of due process of law."

And in a concurring opinion in the *Pointer* case, Mr. Justice Goldberg stated at page 414:

> "I adhere to and support the process of absorbtion by means of which the Court holds that certain fundamental guarantees of the Bill of Rights are made obligatory on the States through the Fourteenth Amendment . . . the Fourteenth Amendment protects the fundamental liberties of individual citizens, it is noteworthy that there is a large area of agreement, both here and in other cases, that certain basic rights are fundamental,—not to be denied the individual by either the State or Federal Governments under the Constitution."

There can be no question but that judicial action in private disputes is a form of State action to which the Fourteenth Amendment is applicable and that States are prohibited from using their courts to abridge the privileges and immunities of citizens and from denying equal protection of its laws to any person. *Hosey* v. *Club Van Cortland*, 299 F. Supp. 501 (U. S. D. C., S. D. N. Y., 1969).

The paucity, the virtual non-existence, of decisions in this most important area of civil litigation cries out for attention to bring to this area of the law the same attention this Court did in the case of *Willner* v. *Committee on Character*, 373 U. S. 96 (1963) wherein you stated on page 103:

> "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood."

Rules of evidence are not innocuous procedural superfluities. They are direct ways of controlling juries and manipulating the outcome of a trial. "It is well known that the extensive and highly refined rules of evidence have developed largely as methods of controlling juries." Moore's Federal Practice, § 43.02(3). While certain exclusionary rules are essential to prevent juries from reaching erroneous conclusions, it is obvious that they are not to be used to induce erroneous conclusions.

> "The realization has slowly grown that the only universal rules of evidence are the rules of relevancy and materiality. When these rules are applied by a court or jury with average power to judge credibility better results are apt to be attained than by the use of many technical and refined rules that (1) either exclude reliable evidence of sound probative value, or (2) are so difficult in application, that their method of application can be drawn in question . . ."
>
> "The Rules have attacked the problem on many

> fronts. Indirectly the pleading rules and the rules on depositions and discovery strike with telling force." Moore's Federal Practice, *Ibid.*

The following cases have held that the right to cross-examine is a fundamental right guaranteed to citizens of the various states, via the Fourteenth Amendment: In re *Aughenbaugh*, 125 F. 2d 887 (CCA, Third Circuit, 1941); *Radic* v. *Fullilove*, 198 F. Supp. 162 (U. S. D. C. for the N. D. of Calif., 1961); *L. B. Wilson, Inc.* v. *Federal Communications Com'n*, 170 F. 2d 793 (D. C. Ct. of App., 1948); *Jenkins* v. *McKeithen*, 89 S. Ct. 1843 (1969); *Southern Garment Mfrs. Ass'n, Inc.* v. *Fleming*, 122 F. 2d 622 (U. S. Ct. of App. for the D. C., 1941); *United States* v. *Dillman*, 146 F. 2d 572 (Ct. of App., Fifth Circuit, 1944); *Hooley* v. *United States*, 209 F. 2d 219 (Ct. of App., First Circuit, 1954); *Philadelphia Co.* v. *Securities and Exchange Commission*, 175 F. 2d 808 (Ct. of App., D. C. 1948).

The foregoing cases are summed up very succinctly in *Derewecki* v. *Pennsylvania Railroad Company*, 353 F. 2d 436 (Ct. of App., Third Circuit, 1965), at page 442:

> "We realize that the right of cross-examination inheres in every adversary proceeding and that it is established beyond any necessity for citation of authorities, with certain exceptions not pertinent here, that if cross-examination of an available witness is not had the litigant, deprived of cross-examination, has been denied due process of law."

Although the United States Supreme Court has ruled rather frequently concerning due process, the right to confront witnesses and the right to cross-examine witnesses in administrative proceedings and in criminal matters, this Court has never (to the best of our knowledge) ruled upon these constitutional rights in civil litigation. By virtue of this lack of direction, state courts have been and continue to run rampant over constitutional rights of litigants

in civil cases by means of arbitrary, capricious, thoughtless and unfair rulings. The intolerable situation will continue until state courts are made aware by this court that there is a constitutional limitation upon arbitrariness and that constitutional fundamental due process does exist in civil litigation.

III.

The Supreme Court of the State of Illinois has approved direct appeals to the bias and prejudice of the jury in the most flagrant and direct manner and has ignored all prior contrary precedent of courts of review of the State of Illinois and has thereby denied to your petitioner the protection granted by the Fourteenth Amendment to the Constitution of the United States (a) by denying your petitioner due process of law; (b) by denying petitioner equal protection of the law, (c) by, in effect, depriving petitioner of trial by jury, as guaranteed by Article II, § 5 of the Illinois Constitution; and (d) by abridging the privileges and immunities of a citizen of the United States. The Illinois Supreme Court has sanctioned conduct during trial which was so extremely prejudicial, abusive and vindictive as to prevent any jury from forming a fair and unbiased verdict.

To the best of our knowledge, the United States Supreme Court has never entered a ruling in the area of civil litigation here under discussion. We fully realize and understand the reasons therefor, the burdensome and limitless sea the Court would seem to be embarking upon. Nevertheless, this Court has in the past ruled where decision was required and by so doing has preserved that fundamental fairness required by the Constitution.

Due process requires that the tribunal be fair and impartial (16 Am. Jur. 2d 582). Arbitrary action by the

tribunal in hearing a cause violates fundamental due process (16 Am. Jur. 2d 575). Essential fairness in trials is a constitutionally guaranteed right. Due process embodies the differing rules of fair play which, through the years, have become associated with differing types of proceedings. *Hannah* v. *Larche*, 363 U. S. 420.

> "A state may regulate the procedure of its courts in accordance with its own conception of policy and fairness *unless it offends some principle of justice ranked as fundamental . . .*" 16 Am. Jur. 2d 944, *Bute* v. *Illinois*, 333 U. S. 640.
>
> "What state procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and history is relevant to these inquiries." 16 Am. Jur. 2d 946.
>
> "The proceeding or hearing requisite to due process must be appropriate, fair, adequate, and such as is practicable and reasonable in the particular case. It must be an orderly proceeding adapted to the nature of the case, in which the person to be affected has an opportunity to defend, enforce, and protect his rights." 16 Am. Jur. 2d 975, 976.

In reaching its decision, the Illinois Supreme Court has ignored every previous precedent of the State of Illinois. The Illinois Supreme Court has ruled that a party litigant may ask the jury to judge the law suit as if they were a party litigant on trial for their lives or involved in a personal injury suit and has approved defendant's counsel asking the jurors to place themselves in the position of the defendant concerning certain elements of the case. Such an appeal, of necessity, can be directed only to the sympathy, bias, passion and prejudice of the jurors. If a juror were to consider himself in the position of one of the party litigants, by definition that juror would be biased or prejudiced in his consideration of the case.

The Illinois Supreme Court sanctioning of defense counsel's vindictive personal attack upon the plaintiff and his attorney, during closing argument, urging that the plaintiff and his counsel were attempting to pervert testimony, suppress evidence and suborn perjury and fraud is a gross violation of fundamental fairness guaranteed by the United States Constitution to every litigant. Defendant's counsel having launched a vituperative attack upon the plaintiff's attorney, having accused the plaintiff and his attorney in so many words of attempting to "pervert their testimony", having constantly urged the jury to believe that plaintiff and his attorney had urged independent witnesses to alter their testimony and that the witnesses had tried to alter their testimony but that the truth was brought out by defendant's attorney himself upon cross-examination, having urged that plaintiff's attorney had in other ways attempted to twist and alter the true picture of the circumstances, for instance by use of improper photographs (none of which is substantiated by the record but is in fact refuted by the record), the case was then so prejudiced against the plaintiff that it could no longer expect a fair and reasonable consideration of the evidence to which he is, at least theoretically, guaranteed under the Constitution of the United States of America.

In the case of *Buttny* v. *Smiley*, 281 F. Supp. 280 (U. S. Dist. Ct. for the Dist. of Colo., 1968), the court stated at page 286:

> "The test of whether or not one has been afforded procedural due process is one of fundamental fairness in the light of the total circumstances . . . . . That case held, consistant with other legal authority, that no particular method of procedure is required for due process, but what is required is . . ." (3) An orderly hearing adopted to the nature of the case; and (4) A fair and impartial decision."

Constitutional guarantees are meaningless words if they are not given effect and enforced. Your petitioner has not received a fair trial in accordance with due process of law, equal protection of the laws, trial by jury and in accordance with the privileges and immunities of citizens of the United States.

CONCLUSION.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Illinois.

Respectfully submitted,

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APPENDIX A.

(Opinion and judgment of the Appellate Court of Illinois, First District, rendered October 23, 1968.)

This action had its origin on January 3, 1965, at about 7:45 P. M., when the plaintiff, Edward Bruske, sought to walk across a busy street in the city of Peru at a point other than a marked pedestrian crosswalk. There is conflict as to whether he was struck by a car driven by defendant, Judith A. Arnold, or whether he walked into its side. In any event, plaintiff brought suit in the circuit court of LaSalle County to recover for personal injuries, and here appeals from a verdict and judgment for defendant. His contentions are that he was prejudiced by a special interrogatory given on defendant's behalf; that the trial court erred in refusing to permit defendant's impeachment on the basis of a prior and purportedly inconsistent statement; and that the closing argument of defendant's counsel was improper and prejudicial in many respects.

The disputed special interrogatory, given at defendant's request over plaintiff's objections, was as follows:

> "Was the plaintiff, Edward Bruske, in the exercise of ordinary care for his own safety before and at the time of the occurrence?"

Consistent with its general verdict for defendant, the jury returned a "No" answer to such interrogatory.

For reasons more fully explained in the opinion of this court in *DeBolt* v. *Wallace*, 56 Ill. App. 2d 380, it must be agreed that the special interrogatory was incomplete and improper for its failure to include the additional element of whether plaintiff's negligence proximately contributed to his injuries. (*C.f. Moyers* v. *Chicago & Eastern Rail-*

road Co., 43 Ill. App. 2d 316.) At the same time, however, we cannot say on this record that it was so prejudicially erroneous as to require a reversal. While not a conclusive cure of the error in the interrogatory, the jury was fully instructed on proximate cause and when that circumstance is laid beside the evidence there is little reason to conclude that the jury was misled or confused by the deficiency in the special interrogatory. In our opinion the weight of the evidence supports the finding that plaintiff was guilty of contributory negligence, and the only reasonable conclusion with the jury could have reached from the same evidence was that such negligence was a proximate cause of plaintiff's injuries.

Circumstances surrounding the unique impeachment issue raised in the appeal show that for many months prior to August 30, 1966, counsel for defendant had made an appearance in the case and had formally engaged in pretrial activities. On the day named, without notice to anyone and despite the knowledge that defendant was represented by counsel, a private investigator employed by plaintiff's counsel appeared at the home of defendant with a court reporter and took a question and answer statement from defendant concerning the accident involved in the pending litigation. At the trial a motion of defendant to suppress the statement of August 30, 1966, was granted *in limine*, the remarks of the trial court indicating his ruling to have been based upon a belief that the statement had been unfairly and unethically procured. Later, the court refused a proffer by plaintiff of portions of the statement claimed to be inconsistent with defendant's testimony at the trial.

We are first met here by arguments and counterarguments as to whether the portions of the statement relied upon by plaintiff in fact serve to impeach defendant's trial testimony. And while we lean to the view that

the statement, when read in its entirety and in proper context, is not materially contradictory, we feel the impact of the manner in which the statement was obtained could have upon future litigation makes it incumbent upon us to determine the primary issue of whether the trial court properly suppressed defendant's statement.

To support his contention that the court erred, plaintiff relies upon the principle, propounded by many authorities, that even though evidence may have been obtained illegally it is nonetheless admissible in a civil action if it is relevant to the issues of the case. Justification for the rule is founded upon the notions that the ascertainment of the truth is more important than the manner in which the evidence was obtained, and that to conduct collateral inquiries into the manner in which evidence was acquired would, as Wigmore puts it, "jeopardize the primary litigation by delaying, interrupting, confusing and sometimes frustrating it." (See: 8 Wigmore on Evidence (1961 Ed.), sec. 2183; 29 Am. Jur. 2d, Evidence, sec. 408, pp. 466-467; *Mossman* v. *Thorson*, 118 Ill. App. 574, 576; *Thanhouser* v. *Milprint, Inc.*, 192 N. Y. S. 2d 911.) However, none of the authorities or decisions presented to us are precisely applicable, and to our minds there are far deeper considerations than a mere rule of evidence presented by the instant case.

For many years now, once litigation has been filed and all parties have appeared, the pretrial search for, and disclosure of, matters relevant to the issues of the subject matter involved in the pending litigation has been controlled by discovery rules promulgated by our Supreme Court. They are presently found in Rules 201 through 219, Part E, Article II of the Illinois Supreme Court Rules. (Ill. Rev. Stat. 1967, chap. 110A, Rules 201 thru 219.) And while the decisions of the court leave little doubt that their primary purpose is to permit the parties to seek out the truth unfettered by technical avoidances (e.g. *Monier*

v. *Chamberlain*, 35 Ill. 2d 351; *People ex rel. General Motors Corp.* v. *Bua*, 37 Ill. 2d 180), we believe the rules were also intended to have the equally important purpose of fixing the guidelines for a fair and orderly procedure by which discovery may be accomplished. Indeed, Rule 201 (c) specifically provides for protection against abuses, which may be equated with unfairness, through the media of protective orders or court supervision. Still another protection, which we feel has significance here, is the direction of Rule 201 (d) that discovery may not be initiated "prior to the time all defendants have appeared or are required to appear." The logical inference is, we believe, that the attorney for defendants must be dealt with in accomplishing discovery. With specific reference to oral depositions, and again for the undoubted purpose of insuring fairness and protection, Rule 206 ordains that a party desiring to take a deposition shall "serve notice in writing a reasonable time in advance on the other parties," while Rule 207 requires the deposition to be signed by the deponent and authenticated by the officer before whom it is taken. These are not mere idle directions, for the rules of the Supreme Court have the force of law when adopted. *Harris* v. *Annunzio*, 411 Ill. 124; *Department of Finance* v. *Sheldon*, 381 Ill. 256.

Viewed from the standpoint of stark reality, what plaintiff's counsel did here was to cause defendant's deposition to be taken on oral examination without prior notice to anyone, and in complete disregard of Canon 9 of the Canons of Ethics adopted by the Illinois State Bar Association which provides in pertinent part: "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; * * *." As could be expected, the resulting statement was accomplished to some degree by leading questions. Under the circumstances that an action had been filed and counsel had appeared for

defendant, and limiting ourselves to the matter of taking such a statement from a party, as distinguished from some other person, we are of the opinion that the trial court properly suppressed defendant's statement and correctly refused to receive the portions of it proffered in evidence. To hold otherwise would not only condone unethical practice but, more importantly, would reduce the requirements for fair and orderly procedure found in the discovery rules for empty platitudes. We believe it would produce chaos and be derogatory to the best interests of the public, the courts and the profession to give sanction to a practice whereby a party to pending litigation may be questioned by opposing counsel or his agents without notice, restriction or inhibitions by rules of practice and canons of ethics.

In an extensive attack on the final argument of counsel for defendant, it is now urged by plaintiff that the argument was "irreparably prejudicial" because counsel: (a) asked the jurors to place themselves in the position of defendant; (b) argued his personal experiences as an attorney; (c) launched a vindictive attack on plaintiff and his attorney; and (d) implied that plaintiff had been drinking although the court had eliminated the issue from the trial. While we think these claims are exaggerated to some degree, it is sufficient to point out that these matters are not open to our consideration in this case. In none of the instances of which complaint is now made did plaintiff object, seek a ruling or move for a mistrial. He thus waived the alleged error and cannot complain for the first time on review. (*Lindroth* v. *Walgreen Co.*, 338 Ill. App. 364, 383-384, aff'd. 407 Ill. 121, 136; *Pearmon* v. *Morris*, 15 Ill. App. 2d 486, 499; *Andres* v. *Green*, 7 Ill. App. 2d 375; *McElroy* v. *Force*, 38 Ill. 2d 528.) We are not unmindful that the rule has an exception where the argument of counsel is so inflammatory and prejudicial as to deteriorate the judicial process and deny a fair trial. (*Belfield* v. *Coop.*

8 Ill. 2d 293; *City of Chicago* v. *Pridmore*, 12 Ill. 2d 447; *City of Quincy* v. *V. E. Best Plumbing & Heating Supply Co.*, 17 Ill. 2d 570.) From our examination of the entire record, however, particularly the arguments of counsel, we cannot say the remarks now complained about were so materially prejudicial as to warrant our intervention.

Additional charges levelled at the closing argument of defense counsel are that it misrepresented and contradicted the testimony of the plaintiff, and that, with no basis in the evidence, the jury was told that plaintiff's attorneys had directed independent witnesses not to talk to defense counsel. These contentions are arrived at, however, only by undue selectivity from the record, and in our opinion the trial court did not abuse its discretion in overruling plaintiff's trial objections. Defendant had a right to argue on the basis of evidence adduced from the cross-examination of plaintiff, and was not confined to what was stated on direct examination as plaintiff's posture here necessarily assumes. Again, while one witness did deny that he had been told not to talk to defense counsel, other portions of the record sustain defense counsel's argument that such a tactic was pursued. Within this point of argument it is also contended that the testimony of other witnesses was contradicted and misrepresented; however, in these instances proper and timely objections were not made in the trial court so as to preserve the contentions made for review.

The ultimate question on review is not whether a trial was scrupulously free from error, but whether there was error which operated to the prejudice of the appealing party or unduly affected the outcome below. (*Nelson* v. *Union Wire Rope Corp.*, 31 Ill. 2d 69, 118.) Applying that test here we find no reason to disturb the judgment appealed from and it is therefore affirmed.

JUDGMENT AFFIRMED.

APPENDIX B.

(Opinion and judgment of the Supreme Court of the State of Illinois, rendered November 26, 1969.)

Mr. Justice Kluczynski delivered the opinion of the court:

On January 3, 1965, while walking across a busy street in the city of Peoria, plaintiff, Edward Bruske, sustained serious injuries when he was struck by an automobile driven by defendant, Judith A. Arnold. His suit to recover for these injuries, instituted in the circuit court of LaSalle County, resulted in a verdict and judgment for defendant, and plaintiff appealed. The Appellate Court, Third District, affirmed (100 Ill. App. 2d 428), and we granted leave to appeal.

The principal issue raised involves the trial court's refusal to allow the plaintiff to impeach the defendant on the basis of an allegedly inconsistent statement made prior to trial to an investigator used by the plaintiff. Although it is debatable whether the statement serves to impeach the defendant's trial testimony, we elect, as did the Appellate Court, to rule on the propriety of its suppression because of the importance of this issue to future litigation.

The factual background against which this impeachment issue is framed is fully set out in the Appellate Court opinion. All that need be noted for coherent discussion is that the statement was given to a private investigator hired by plaintiff's counsel prior to trial but subsequent to the filing of the lawsuit and the appearance of defendant's counsel. The statement was taken at defendant's home, without notice to her counsel despite plaintiff's counsel's knowledge

that she was so represented. The statement consisted of a series of questions, usually leading, and answers, and was transcribed by a court reporter. Pursuant to defendant's motion at trial, the trial judge suppressed the statement for all purposes, including impeachment, indicating he considered it to have been illegally and unethically procured.

To overturn his ruling, plaintiff advances two alternative arguments. He contends that the statement was not obtained illegally as no attempt was made to mislead the defendant, or even if obtained illegally it is nonetheless admissible.

In our courts, once a lawsuit has been filed, and all parties have appeared, the pretrial search for matters relevant to the pending litigation is controlled by discovery rules promulgated by this court. (Rules 201-219, 36 Ill. 2d 54-82, Ill. Rev. Stat. 1967, ch. 110A, pars. 201-219). These rules, which have the force of law (*Harris* v. *Annunzio*, 411 Ill. 124), provide, *inter alia*, that discovery may not be initiated "prior to the time all defendants have appeared or are required to appear" (Rule 201(d)) and that proper notice be furnished in writing upon the other parties when depositions are sought to be taken. (Rule 206(a).) To implement the enforcement of such directions, Rule 201(c) empowers the court to "make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." In addition to our rules, Canon 9 of the Canons of Ethics adopted by the Illinois State Bar Association, provides in pertinent part: "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; * * *." From a mere recitation of the pertinent provisions of our rules and Canon 9 of the Canons of Ethics, we think it manifest that the statement complained of must be considered to have been illegally obtained. No serious argument

against such conclusion may stand, as it makes slight difference that the statement of a party was taken by an agent of plaintiff's counsel rather than counsel himself. The real question, therefore, becomes whether, notwithstanding this illegality, the statement should have been admitted.

Support for its admission may be found both in case law and respected treatises on evidence. (See 8 Wigmore on Evidence, 1961 Ed., sec. 2183; Jones, Laws of Evidence, 5th Ed., Vol. 14 (1958) par. 868; *Thanhouser* v. *Milprint, Inc.*, 192 N. Y. S. 2d 911; *Walker* v. *Penner*, 190 Ore. 542, 227 P. 2d 316.) The rationale for admissibility rests upon the idea prevalent at common law, that the importance of ascertaining the truth overrides the manner in which evidence is obtained, and that collateral inquiries made at trial into the manner of obtaining it merely delay and frustrate the primary litigation. It is our opinion, however, that such common-law notions, no matter how well documented or oft-repeated, must yield in this situation to the controlling language of our rules of discovery and the prohibition expressed by Canon 9.

In reaching this opinion, we are not unmindful that rules of discovery should not necessarily operate as exclusionary rules of evidence or that separate procedures exist for the regulation and discipline of unethical conduct on the part of attorneys. Rules, however, to be effective must carry an appropriate sanction; otherwise, the orderly process of a lawsuit is left to the mercy of the individual's sense of justice. We deem that the appropriate sanction in this instance was the exclusion from evidence of the statement. Accordingly, we hold that the suppression of the statement was proper.

Plaintiff next charges that the trial court erred in giving the following special interrogatory: "Was the plaintiff, Edward Bruske, in the exercise of ordinary care for his

own safety before and at the time of the occurrence?" Consistent with its general verdict, the jury returned a "No" answer to this interrogatory. Plaintiff argues, and we must agree, that the interrogatory is defective because it fails to include the additional element of whether his (plaintiff's) negligence proximately contributed to his injuries. We do not, however, regard such defect as reversible error. The jury was fully adequately instructed on the law concerning contributory negligence, including the requirement of proximate cause. While not a complete cure for the faulty interrogatory, when these instructions are viewed together with the evidence in the case, there is little indication that the jury was confused by the interrogatory to the detriment of the plaintiff.

It is finally contended that the closing argument of defendant's counsel was improper and prejudicial. More specifically, it is urged that defense counsel improperly: (1) argued his personal experiences as an attorney; (2) asked the jurors to place themselves in the position of the defendant immediately prior to the accident; (3) suggested that plaintiff's attorneys would use distorted evidence in support of his case, and (4) implied that plaintiff had been drinking although the trial court had previously excluded this issue from the trial. None of these instances now relied upon for reversal, however, were objected to at trial and must therefore be considered waived. (*McElroy* v. *Force*, 38 Ill. 2d 528.) It is true that this rule of waiver would not apply where the argument of counsel is so inflammatory and prejudicial as to deteriorate the judicial process. (*Belfield* v. *Coop*, 8 Ill. 2d 293.) And it is also true that once an objection has been made, and a ruling obtained, it is not necessary to repeat the same objection to preserve the point for review. But from our reading of the record, including the closing argument of both sides, we see no reason to relax the waiver principle in this case. The only

reference made to drinking was that plaintiff had stepped off the sidewalk after emerging from the doorway of a tavern. The location of the tavern door in relation to plaintiff's route across the street was a fact in evidence. It is evident that reference to the tavern was made for the purpose of showing that plaintiff was not walking in a crosswalk when struck rather than suggesting that he had been drinking. Similarly, the request of the jurors to ask themselves what they would have done under the circumstances to avoid the accident does not appear designed to make them sympathetic to the defendant's cause. On the contrary, such request seems perfectly consistent with the ultimate task of the jury: namely, to apply "the reasonable man" standard to the defendant's conduct.

Closely tied to the charge concerning statements made about the willingness of plaintiff's counsel to use perverted evidence are plaintiff's additional charges that the defense's closing argument grossly misstated his testimony and erroneously accused his counsel of telling witnesses "not to talk" with lawyers for the other side. Timely objections were made to these remarks and they therefore merit close inspection.

A review of the entire record convinces us that the evidence does not justify the accusation that plaintiff's counsel told witnesses not to speak with opposing counsel or the suggestion that they wanted to use or would use perverted testimony. These statements were improper but not entirely unsupported by the evidence. For example, witnesses did admit to being told they "did not have to talk" with the other side. Furthermore, plaintiff introduced photographs taken from a perspective which made the situs of the accident as testified to by witnesses appear closer to the crosswalk than its true distance. Such examples serve to explain, though not excuse, the statements in question.

With regard to the alleged misstatements of plaintiff's testimony, it must be observed that the defendant was not limited to statements made on direct examination; the defendant could present plaintiff's testimony in the light most favorable to her case. To the extent this presentation might be thought to exceed the limits of permissible advocacy, it was cured by the trial court's cautionary remarks that the jury should decide the case on the basis of the evidence it heard. In addition, plaintiff had the opportunity to rebut any misstatements in the closing argument and did so.

Viewing defendant's closing argument as a whole, it is our opinion that the improprieties alleged do not require a new trial. As the appellate court pointed out at page ....

"'[T]he ultimate question on review is not whether a trial was scrupulously free from error, but whether there was error which operated to the prejudice of the appealing party or unduly affected the *outcome below*. (*Nelson* v. *Union Wire Rope Corp.*, 31 Ill. 2d 69, 118.)" In this instance, we hold that there was not.

For the foregoing reasons, the judgment of the Appellate Court, Third District, is affirmed.

JUDGMENT AFFIRMED.

APPENDIX C.

(Order of the Supreme Court of the State of Illinois entered January 26, 1970, denying Petition for Rehearing.)

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

APPENDIX D.

(References are to the pages as numbered in the trial court record.)

On the evening of January 3, 1965, between 7:30 P.M. and 8:00 P.M., Petitioner Edward Bruske, while a pedestrian crossing Fourth Street near its intersection with Schuyler in the City of Peru, Illinois, was run down by the automobile operated by the Respondent, Judith A. Arnold. (R. 189, 190, 193, 248, 251, 304, 305, 370-380, *et seq.*)

On August 30, 1966, approximately six months before her testimony at the trial, the defendant voluntarily made statements concerning material issues in the case, which statements were directly contrary to her testimony at the trial. These issues went to the heart of the case and were strongly contested at the trial by defense.

The defendant's prior statement contradicted her testimony at the trial concerning the following material issues, among others.

1. From the time the defendant turned right (east), onto Fourth Street, to the moment of impact there were no vehicles going west which could have obstructed her view of the plaintiff and the north curb of Fourth Street. (R. 39-50.) (At the trial the defendant testified that she could not see the plaintiff in the west bound lane because the plaintiff had darted out between vehicles passing to the west immediately prior to the impact of her vehicle with the plaintiff.) (R. 509, 510.)

2. Just prior to the impact, the defendant's attention was diverted when she looked to see if she had cleared a car parked on the southeast side of Fourth Street at its intersection with Schuyler. (R. 39-50.) At the trial the

defendant had testified that nothing had diverted her attention.) (R. 511-539.)

3. The impact occurred as the defendant was making her turn onto Fourth Street. (R. 39.) (At the trial the defendant testified the impact occurred 40 to 60 feet east of the intersection.) (R. 512.)

4. The defendant hit the plaintiff (a pedestrian) with the front of her vehicle. (R. 43-46.) (At the trial the defense claimed the plaintiff walked into the side of the vehicle.) (R. 511-519, 531-552, 642-652.)

5. After the plaintiff landed on the pavement he did not move from that position; he had tried and a bystander kept him down. (R. 43.) (At the trial the defendant testified that the plaintiff had gotten up from the pavement along the left front fender and walked to the front of the defendant's car, which also was contrary to the testimony of the independent witnesses.) (R. 508-539.)

At the trial the defendant moved to suppress the statement for all purposes, including impeachment, which motion was granted. The ground for suppressing the statement was that the attorneys for the defendant were not notified, prior to the statement. A copy of the statement was furnished to the attorneys for the defendant some time prior to the trial. The statement was taken by an independent contractor, Mr. Cy Couet, a member of a private investigating firm, which had investigated the entire case including everybody known to the plaintiff who had an involvement in the case. The questions and answers were taken down and reported by a court reporter, Mr. Raymond O. Estridge, of the reporting firm of Harry O. Nottingham, Inc., 127 North Dearborn Street, Chicago, Illinois, and transcribed. The defendant objected that the taking of the statement was unethical and that the statement should be suppressed in its entirety. The motion was granted.

Additional Argument, Point A of the Petition Concerning Defendant's Prior Contradictory Statement.

In her answer to the petition, Defendant would have this court believe her prior statement was not contradictory to her testimony at the trial.

That the prior statement was diametrically contradictory to material issues going to the core of liability in a closely contested case is illustrated in the following quotations from the record. In fact, the contradictions are so gross as to cause one to wonder if the defendant's testimony at the trial might have been a fabrication.

Among the questions to which the defendant had given contradicting prior statements, are the following:

1. From the time the defendant turned right (east), onto Fourth Street, to the moment of impact there were no vehicles going west which could have obstructed her view of the plaintiff and the north curb of Fourth Street. (At the trial the defendant testified that she could not see the plaintiff in the west bound lane because the plaintiff had darted out between vehicles passing to the west immediately prior to the impact of her vehicle with the plaintiff.)

Statement August 30, 1966:

"Q. How about traffic coming on Fourth, was there any at that time?

A. No.

Q. You were clear to make your turn?

A. Yes. (Vol. 3, p. 40.)

Q. You had stopped there at the corner? (Vol. 3, p. 47.)

A. Yes, I had come to a complete stop, and had waited for several cars to pass, and there was a break in traffic.

Q. *There were no cars coming?*
A. *At least four or five blocks away.*

* * * * *

Q. There was no traffic moving westward at this time causing a glare of headlights? There was no traffic coming the other way? (Vol. 3, pp. 49 and 50.)
A. *I feel like if there was traffic coming the other way I would have waited. As I remember the street was practically all mine.*

Q. *Deserted at that time?*
A. *Yes.*

Q. *From the time you made your turn until this happened there were no cars moving either way?*
A. *I got out of the car and got up to him before any cars* came near us."

* * * * *

Testimony at trial:

"Q. What was the next thing that happened? (R. 508.)
A. Well, the next thing I can remember, the next thing I know, I heard a thump, when I seen a man against my windshield.

Q. *Judith, at that time when you heard this thump, tell the court and jury where those cars were, those cars that you saw, that you were coming left.*
A. *They were passing me at the time.*

Q. Do you know how many cars there were?
A. Five or six at least. (R. 508.)

* * * * *

Q. In relation to the time that the last one of those cars went by, *and I am asking you that at the time the last of those cars went by, when was it that you heard the thump in relation to those—in relationship to that occurrence?* (R. 509.)
A. *Almost immediately.*"

2. Just prior to the impact, the defendant's attention was diverted when she looked to see if she had cleared a

car parked on the southeast side of Fourth Street at its intersection with Schuyler. (At the trial the defendant had testified that nothing had diverted her attention.)

Statement August 30, 1966:

"Q. There were no other people crossing?

A. No, I had looked on the other side of the street, and it was dark over there, and I could see parked cars there, and there were several people up by the show there.

Q. You noticed it was (while, sic.) you were making a turn? (Vol. 3, p. 48.)

A. Yes, I tried to look both ways because of that, and I have no recollection of anyone standing close to the curb, even start to cross the street. *The only thing that I could think of that might have diverted my eyes was to see if I had cleared the car that was parked there.*" (Vol. 3, p. 49.)

* * * * *

"Q. Did he have a cap or hat on or anything? (Vol. 3, p. 42.)

A. No.

Q. His clothing more or less was on the dark side?

A. Yes.

Q. At the time your attention was attracted to the right?

A. Yes, the first time I saw the man he was already hitting the windshield."

Testimony at trial, February 17, 1967:

"Q. You could see in the west bound lanes?

A. Yes.

Q. Did you from that time until the accident happened continue to glance to those westbound lanes?

A. Yes, I did.

Q. *In other words, from the time the automobile went by until the time the occurrence took place, you always had those westbound lanes in your view?*

A. Yes. (R. 531.)

* * * * *

Q. *All of this time you were looking over the front of your windshield with a view of the westbound lanes?*
A. *Yes, sir, I was.*" (R. 532.)

* * * * *

3. The impact occurred as the defendant was making her turn onto Fourth Street. (At the trial the defendant testified the impact occurred 40 to 60 feet east of the intersection.)

Statement August 30, 1966:

"Q. When you got to Fourth and Schuyler there is a stop sign?
A. Yes, I stopped, and I was going to go east, and I looked to see what he was doing, and he had already gone ahead of me, *and when I pulled onto Fourth and as I did I hit him.*" (Vol. 3, p. 40.)

* * * * *

The testimony at trial:

"Q. About how far, going back a little, (R. 511; A. 24.) about how far had you gone from the intersection in relation to the intersection at the time you heard this thump?
A. Somewhere between 40 and 60 feet. I really don't know for sure." (R. 512.)

4. The defendant hit the plaintiff (a pedestrian) with the front of her vehicle. (At the trial the defense claimed the plaintiff walked into the side of the vehicle.)

Statement August 30, 1966:

"Q. The initial point of contact with the automobile would be about where?
A. *Right close to the headlights, he would have hit my bumper, about his knee.*
Q. The headlight and the bumper?
A. *Yes, right on the edge of it.*" (Vol. 3 of the Record, page 43.)

* * * * *

Testimony at trial, February 17, 1967:

"Q. You never saw him come in contact with your automobile other than the time he was against your windshield?

A. No. (R. 531.)

Q. All of this time you were looking over the front of your windshield with a view of the west lanes?

A. Yes, sir, I was." (R. 532.)

* * * * *

Closing argument of defense counsel:

"Now, Ladies and Gentlemen that is why I'm telling you this. They tried to tell you, to make out, to get him in front of the car—they didn't tell you that. . . ." (R. 646.)

"If you recall, he checked the front of the car over and there were no marks on the front of the car . . .

"Now you can take this any way you want to. Just think about it for a moment. If she hit him with the front of the car, and bear in mind in making this argument again—to bring this out again, don't hang up on that; but just to give you the character of the plaintiff's case, a split second between the car being here and here (indicating) in other words, when a man steps out behind a passing car; now, I ask you if she hit him with the front of (R. 647) the car the brush marks would show there is no question about that.

* * * * *

If the marks were on the side of the car, and it bears out her testimony, and the physical evidence here, how did he get around to the front?" (R. 648.)

5. After the plaintiff landed on the pavement he did not move from that position; he had tried and a bystander kept him down. (At the trial the defendant testified that the plaintiff had gotten up from the pavement along the left front fender and walked to the front of the defendant's car, which also was contrary to the testimony of the independent witnesses.)

Statement of August 30, 1966:

"Q. Did he actually come up to the windshield do you know? (Vol. 3, p. 42.)

A. Yes.

Q. And then rolled forward and off?

A. To the side.

Q. Left front of the car?

A. *He started to get up and a pedestrian came over and pushed him back down, and told him to lay back down.*" (Vol. 3, p. 43.)

Testimony at trial:

"Q. Judith, what was he doing when you saw him on his hands and knees there? (R. 510; A. 23, 24.)

A. He was trying to get up.

Q. What did he do?

A. *He got up and moved to the front of my car.*"

* * * * *

Q. Did you see him get up then? (R. 537.)

A. I did.

Q. You saw him walking?

A. Yes, several steps, yes.

Q. He walked . . . from the left front wheel, he walked to a position in front of the car?

A. Yes. (R. 538.)

Q. Under his own power?

A. Yes.

Q. With no aid?

A. No, that's right.

Q. How far did he walk in front of the automobile?

A. Two to three feet.

Q. Could it have been as much as five or six feet?

A. More or less, I didn't measure it."

* * * * *

"Q. Was he standing there? (R. 539.)

A. Yes.

Q. In what direction was he looking?

A. South."

The defendant has referred to Supreme Court Rule 201(c)(1), in which it is stated that the court may make such order as justice requires concerning the regulation of discovery procedures in order to prevent expense, embarrassment, oppression, etc. The section relates to pretrial discovery rather than the admissibility of evidence; however, more important, the section is intended to promote justice. Surely, under the circumstances present in this case, the suppression of the defendant's materially contradictory prior statement would suppress justice rather than promote it. Justice is best served by the ascertainment of the complete truth not by the suppression of truth. Never once did the defendant claim that her prior contradictory statement was untrue or that it was obtained under duress or promise of any advantage. The only real reason for the suppression of the statement was that it revealed the defendant's negligence and contradicted her direct testimony elicited by her own attorney during the trial. Moreover, the defendant's attorney capitalized upon the suppression of this statement by calling the jury's attention to the fact that the defendant's testimony was unimpeached and therefore entitled to more credibility.

(a) *Defendant's attorney stated that the plaintiff had testified that he did not look to the right and did not see defendant's automobile.* (R. 654.)
Plaintiff's actual testimony:

"Q. What was the next thing that occurred after getting to the center? (R. 378.)
A. I looked to the west to see if any eastbound cars were coming.
Q. What did you see?
A. I saw one car passing me.
Q. Did you see anything else?
A. There was a stream of cars coming east about three-quarters of a block down.

Q. And then after this one east car passed what did you do?

A. I proceeded across the street.

Q. And as you proceeded across the street what happened then? (A. 378.)

A. Well I took two or three steps and then out of the corner of my eyes I saw the car on top of me. (R. 379.)

Q. In what direction did you see this car out of the corner of your eyes?

A. It was headed east.

Q. Was it headed right or left of you?

A. My right.

Q. When you saw this car out of the corner of your eyes approximately how far away was it?

A. About ten feet.

Q. What did you do then?

A. I raised my arms and hollered 'O No'. I lifted my right leg and I was hit.

Q. How much time elapsed since you saw this car out of the corner of your eye ten feet away until you were hit?

A. I have no idea, it was almost on top of me.

Q. What part of the car came in contact with you? (R. 379.)

A. The front part. (R. 380.)

Q. Then what happened?

A. As soon as I was hit I was out."

* * * * *

"Q. When you were in the center line of the street and you looked to the right, as you discussed with counsel on cross-examination, did you have any difficulty seeing to your right or to the west on Fourth Street? (R. 422.)

Mr. Kelly: Your Honor I object to that. It is improper redirect examination. (R. 423.)

The Court: He may answer.

The Witness: A. No, sir: it was clear.

Mr. Ozmon: Q. Mr. Bruske, besides the one eastbound automobile that passed earlier, what did you see in your view when you looked to your right, when you were in the center line?

Mr. Kelly: Your Honor, I object to that. Leading and suggestive.

The Court: He may answer.

The Witness: There was a stream of cars eastbound about three-fourths of a block from the intersection.

Mr. Ozmon: Q. When you were at the center line, what is your best approximation how long you remained in the center line in taking a look to the right and waiting for that one car to go by?

Mr. Kelly: Your Honor, I object to that. It has already been asked and answered. (R. 423.)

The Court: He may answer. (R. 424.)

The Witness: A. About two to three seconds."

(b) *Contradiction of the testimony given by Kurt Tredoning.*

Defense counsel's closing argument:

"What did Curt say? *Well, they tried to have him testify. What did they try to have him testify* you would think from the direct examination it was like that the place was lit up like a Christmas tree, or floodlights. . . . What did he say? . . . we had to bring this out. I would say it would probably be difficult to see with his clothing. *It is more or less an alley between Happy's Tavern and the apartment house, and it is usually dark, and I guess he went swinging around there and would not be seen too clearly. Doesn't that have the ring of truth about it,* ladies and gentlemen? *Now, I ask you, did they bring this out? Absolutely not. No, they did not. In other words, they tried* — or they were trying to keep this away from this alleyway." (R. 637; 638.)

"*Now, take the witness Kurt. Now, I remind you, ladies and gentlemen there is no reason for this if you*

are bringing out the truth. They asked him where Bruske was crossing the street. They got it down to about ten feet. (R. 638.)

* * * * *

Actual testimony of Kurt Tregoning:

"Q. What particular type of lights were in that particular area as of that time? (R. 245.)

A. Well, those are those fog lights used for good lighting ability for fog.

* * * * *

Q. With those lights in operation what was the condition or what was the general condition of lighting in this vicinity at the Dairy Bar on Fourth Street?

A. Well, fairly well lit up. (*Et seq.* 246, 247.)

* * * * *

Q. When you saw him at that time in the westbound lane can you approximate or give your best estimate in feet where that was in reference to the eastbound lane of Schuyler Street? (R. 250.)

A. Approximately ten to fifteen feet or a car length.

Q. And when you saw him in that position what was he doing?.

A. He was walking across the street."

In regard to counsel's closing statement to the jury, implying the plaintiff came out of an alley near a tavern, the following occurred during cross-examination:

"Mr. Oxmoor: Your Honor, I object to that. . . . It is making a reference to a completely different location. (R. 282.)

* * * * *

"The Court: We are not concerned whether or not he could be seen in the alley, we are concerned with the visibility on the street. (R. 283.)

Mr. Kelly: It is the location where he saw him.

The Court: I didn't hear that in the question.

Mr. Kelly: 'I would say it would probably be difficult . . .'

The Court: No, that is his answer.

Mr. Kelly: He said, 'He could been, seen clearly because of his clothing? That is the question, and in the answer he gets into this location.

The Court: I will sustain the objection. Strike out the answer and read from the witness's previous testimony." (R. 283.)

* * * * *

Q. Was the pedestrian, Mr. Bruske, at any time when you saw him near this alley? (R. 297.)

A. No."

(c) *Contradiction of the testimony given by Raymond Rodda.*

Defense Counsel's Closing Argument:

"Now, with the witness Rodda *they had him say that it* was about ten feet from the crosswalk. *Looking at the distorted photograph*, ten feet from the crosswalk. . . ." (R. 639.)

Now, on speed with the witness Rodda *they had that boy fifteen miles an hour or more.* What did he say? I had to bring it out by their own lengthy statement taken from him, which they didn't mention to you . . ." (R. 639.)

"Now, they had Rodda there with this ten feet business, as I remember it, and they ask you what did he say?

"He said in the statement which he had given that Bruske was crossing about *twenty yards* east of the crosswalk . . ." (R. 640.)

"Now, just remember what the policeman testified to. He testified that he stepped off from the curb line and that it was sixty feet. The difference would be about eight feet, if the witness Rodda said it was *twenty yards*, which is lot closer to what the boy thought it was there than the ten feet they had him testify to from the witness stand." (R. 641.)

* * * * *

Actual testimony of Raymond Rodda:

"Q. With reference to the east curb line over here (indicating) alongside of the tavern do you know approximately how far it is from the east curb line to the point where you saw the pedestrian start to cross? (R. 196.)

A. Yes, sir.

Q. About how much is that?

A. About twenty *feet*.

Q. With relation to this crosswalk in Plaintiff's Exhibit No. 3 and referring to the east edge of that crosswalk do you know approximately how far it is to the east of where you saw the pedestrian start to cross? (R. 197.)

A. Yes, sir.

Q. Approximately how far is that?

A. Approximately seventeen *feet*.

The Court: What was your answer?

The Witness: Approximately seventeen feet.

The Court: Seventeen feet?

The Witness: Yes, sir."

(d) *Defendant's counsel, in his closing statement, told the jury that plaintiff and his attorneys had directed independent witnesses not to talk to defense counsel. This was contrary to the evidence and extremely prejudicial in the manner used by defense counsel.*

Defense Counsel's Closing Argument:

"Well, I ask you what happened? And they callously admitted as to the plaintiff here, the young man sitting here that works for Mr. Ozmon when these witnesses were called out there and Mr. Ferracuti took copies of the statements out to show those boys, which is only fair, of the statements they had given us: *what did he say? Don't talk to anybody. Don't talk to him.* You don't have to talk to him. *Stay away from him.* (R. 641, 642, *et seq.*)

"It was foolish on their part. *They wanted to per-*

vert their testimony, and I say that they didn't want to do it—that is the impulse at the moment. They had gone over these things with these boys; and this ten feet down there when they say—they having had copies of the statements, which we were compelled by rule to give to them, when they think about that they say, *'Don't talk to them.' Now, I ask you, is that justice?* (R. 642.)

"I might remind you, Ladies and Gentlemen, that I have never in my experience in trying law suits told a disinterested witness that you don't have to talk to the other side, stay away from them.

"Let me ask you, *how would you like to be a litigant in a law suit and have John Doe say to you whether or not you were on trial for your life or involved in a personal injury to have the other opposing counsel go to that person and say to them, 'Don't talk to them. Don't tell them anything. Don't* (R. 642) *go to them at all—*"

* * * * *

Testimony of Raymond Rodda:

"Q. Did Mr. Ozmon or any gentleman tell you not to talk to him? (Mr. Ferracuti.) (R. 221.)

A. He told me I didn't have to.

Q. . . . Let me ask you, did this gentleman who is with Mr. Ozmon, he is in the courtroom now over there, didn't he come up to you and tell you that you didn't have to talk to Mr. Ferracuti, or in words to that effect? (R. 221; A. 11.)

A. Yes. (R. 222.)

Q. In fact, he told you not to talk to him, isn't that right?

A. *No, he didn't.*"

The witness had in fact given his statement to the defense attorneys on June 9, 1965. (R. 224.)

(c) *Contradiction of the testimony of Wallace Reese.*

Defense Counsel's Closing Argument:

"Mr. Kelly: Now, Ladies and Gentlemen, also with Mr. Reese . . . What did he say? If you will remember he said that *he was walking across the street at a sharp diagonal with a good part of his back, which had turned at an angle this way (indicating) that is what he said.*" (R. 643.)

Actual testimony of Wallace Reese:

"Q. As he was walking across the street in that sharp angle was a good bit of his back toward the west? (R. 322.)

A. *I would say no. No, I would say no.*"

(f) *Contradiction of the testimony of Raymond Stachowiak.*

Defense Counsel's Closing Argument:

"Now, Ladies and Gentlemen, that is why I am telling you this. They tried to tell you, to make out, to get him in front of the car. It was when he was in front of the car—they didn't tell you that—the policeman, which you recall his testimony—*the policeman put him to the left* which bears out Judith's testimony about that. That is an argument that is irrefutable, can't be rejected." (R. 646.)

* * * * *

Actual testimony of Raymond Stachowiak:

"Q. In other words, what you are telling us about is where you found the pedestrian after everything came to a standstill? (R. 446.)

A. Yes.

Q. *The pedestrian was in front of the automobile?*

A. Yes. As I said before, *he was to the front and slightly to the left.*"

(g) *Contradiction of the medical testimony.*

Defense Counsel's Closing Argument:

> "It was brought out that the weight bearing bone, the shin bone, wasn't hurt at all, *and that this bone, the outer bone, which you could almost do without, wasn't fractured, and it healed, and there was no disability whatsoever.*" (R. 660.)

* * * * *

Actual testimony of Dr. William Scanlon:

> "A. . . . The fracture is just a long, small bone here (Indicating), which is called the fibula. (R. 341.)
>
> * * * * *
>
> Q. This fracture which you have pointed out, to us is approximately how far below the knee joint?
>
> A. Approximately three and a half inches.
>
> * * * * *
>
> Q. Doctor, medically, or practically speaking, not to try and improve on nature, could an individual almost do without the fibula if he had to? (R. 362.)
>
> A. That is possible, although the fibula has a definite function."

The jury was deprived of the knowledge that Mrs. Arnold had previously given a completely different version of the facts and circumstances surrounding the accident. Mrs. Arnold's attorney, in his closing argument, capitalized upon the suppression of her previous statement by directly drawing the jury's attention to the fact that Mrs. Arnold's testimony was unimpeached by any prior statement while certain of the other witnesses had been questioned concerning prior statements. For instance, the defendant's attorney, in his closing argument, stated (R. 658, 659):

> ". . . if you testify to the facts, you don't have to worry about any lawyer cross-examining you. You can't cross-examine the truth. *If you tell the facts you don't have to worry about something you said the day before yesterday because you always remember*

the truth. You don't have to worry about anybody crossing you up, and there is no need for the opposing counsel or opposing lawyer to say, 'Didn't you say this or didn't you say that under oath?' *That is why I am sure of her testimony as I saw her on the witness stand and as I heard the testimony. It isn't impeached in any way.* She just told you the simple truth."

"Was she impeached by that point where she made something to the contrary—some statement to the contrary? Not a bit." (R. 650.)

"If you tell the facts you don't have to worry about (R. 658) something you said the day before yesterday because you will always remember the truth . . . That is why I am sure of her testimony (Mrs. Arnold's) as I saw her on the witness stand and as I heard the testimony. It isn't impeached in any way . . ." (R. 659.)

The seriously prejudicial nature of the defense attorney's remarks, the objection made thereto and the Court's total disregard to the unfairness of the situation are illustrated in the following brief excerpt and are characteristic of the atmosphere the defendant created throughout the entire case.

"I might remind you, Ladies and Gentlemen, that I have never in my experience in trying law suits told a disinterested witness that you don't have to talk to the other side, stay away from them.

"Let me ask you, how would you like to be a litigant in a law suit and have John Doe say to you *whether or not you were on trial for your life or involved in a personal injury* to have the other opposing counsel go to that person and say to them, 'don't talk to them. Don't tell them anything. Don't go to them at all'.

"Mr. Oznon: Your Honor, I object to this, improper argument.

"The Court: The jury will decide this case on the evidence which has been admitted and the law as I instruct the jury, nothing else. Proceed." (R. 642, 643.)

The foregoing represents an example of a most flagrant abuse of closing argument and is typical of the defense counsel's conduct. The Court's statement constituted a ruling denying the plaintiff's motion and totally disregarding a *direct appeal to the sympathy and prejudice of the jury*. What could be more prejudicial than asking a jury to judge the case as if he were the defendant and, to make matters even worse, *a defendant on trial for his life*. Nevertheless, the Court totally disregarded the irreparable injury created by defendant's counsel's statements and merely brushed the matter off with the remark that the case would be decided upon the evidence.

Another example of the plaintiff's objection and the ruling of the trial court occurred when the defendant's counsel directly contradicted the evidence, informing the jury that the plaintiff had said he did not look to the right.

The plaintiff's attorney objected, to which the court stated,

"The jury heard the evidence. Proceed." (R. 657.)

Again, the trial court completely ignored the prejudicial atmosphere created by the defendant and, in effect, overruled the plaintiff's objection to a materially prejudicial matter.

It has been the law in Illinois for more than half a century that it is not necessary to constantly interrupt and repeat the same objection after an adverse ruling has been obtained. Moreover, it has continually been held that where arguments are so prejudicial and reprehensible that the parties cannot receive a fair trial and the judicial process cannot stand without deterioration, the reviewing court will consider assignments of error even though no objection at all was made at the time of the occurrence.

SUPREME COURT, U. S.

MAY 2 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1403

EDWARD BRUSKE,

Petitioner,

vs.

JUDITH A. ARNOLD,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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I.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1403

EDWARD BRUSKÉ,

Petitioner,

VS.

JUDITH A. ARNOLD,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

To The Honorable Warren E. Burger, Chief Justice Of The United States, And The Associate Justices Of The Supreme Court Of The United States:

The Respondent prays that the Writ of Certiorari should be denied.

OPINIONS.

The opinions of the Appellate and Supreme Courts are correctly cited and set out in the appendices by the Petitioner.

JURISDICTION.

Respondent makes no contention as to the jurisdiction of the Supreme Court.

QUESTIONS PRESENTED.

It is the position of the Respondent that the questions presented are without merit, and that there are no valid grounds for this Court to consider the Petition.

STATEMENT OF FACTS.

The Statement of Facts contained in the Petition for Writ of Certiorari is truncated and grossly inaccurate from the standpoint of fair presentment of the facts, and is unduly selective.

Respondent therefore considers it necessary for a fair consideration of the questions presented to set out in Respondent's Appendix A what amounts to additional abstract of the record so that this Court may have a true concept of the facts.

The petitioner has taken sentences and words out of context, whereas a fair and complete abstract of the point presents an entirely different factual picture.

An illustration of the character of the presentation by Petitioner is contained in the opening sentence of the Statement of Facts where the Petitioner says that he was "run down by an automobile operated by the Respondent" whereas a fair examination of the testimony indicates a characterization, even by conclusion, that there was a collision between the car and the pedestrian.

Similarly, throughout the appendix of his Petition, the Petitioner tries to present an untrue picture, e.g., re-

---

Defendant-Respondent's Appendices and symbols referred to herein are designated as follows;

RA-A—Additional Abstract of Record
RA-B—Argument of Defense Counsel
RA-C—Statement taken from Judith Arnold
Rec.—Record Transcript.

ferring to the testimony as commented in Petitioner's appendix A 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30. The fair abstracting of this testimony is as follows:

JUDITH ARNOLD, Witness:

Direct Examination by Mr. Kelly.

510 When I got out of my left door, the man was on his hands and knees beside my car at the left front wheel.

520 The man was wearing dark clothes, dark brown coat and dark trousers.

552-557 Offer of proof by plaintiff's attorney by way of prior statement taken from Judith Arnold and excluded by the Court on motion of defendant.

Mr. Ozmon made the following offer of proof as to questions asked defendant in statement taken from her on August 30, 1966:

Q. Did he actually come up to the windshield, do you know?

A. Yes.

Q. And then rolled forward and off?

A. To the side.

Q. Left front of the car?

A. He started to get up and the pedestrian came over and pushed him back down and told him to lay back down.

Q. When you got to Fourth and Schuyler, there is a stop sign?

A. Yes, I stopped and I was going to go east, and I looked to see what he was doing and he had already gone ahead of me, and then I pulled onto Fourth and as I did I hit him.

Q. How about traffic coming on Fourth, was there any at that time?

A. No.

Q. You were clear to make your turn?

A. Yes.

Q. The initial point of contact with the automobile would be about where?

A. Right close to the headlights, he would have hit my bumper about his knee.

Q. The headlight and the bumper?

A. Yes, right on the edge of it.

Q. And he came onto the hood toward your windshield?

A. Yes.

Q. You had stopped there at the corner?

A. Yes, I had come to a complete stop and had waited for several cars to pass, and there was a break in traffic.

Q. There were no cars coming?

A. At least four or five blocks back.

Q. Plenty of time and you were in no hurry?

A. No.

Q. You noticed it as you were making your turn?

A. Yes, I tried to look both ways because of that and I had no recollection of anyone standing close to the curb even start across the street. The only thing that I can think of that might have diverted my eyes was to see if I had cleared the car that was parked there.

Q. There was no traffic moving westward at this time causing a glare of headlights? There was no traffic coming the other way?

A. I feel like if there was traffic coming the other way I would have waited. As I remember the street was practically all mine.

Q. Deserted at that time?

A. Yes.

Q. From the time you made your turn until this happened there were no cars moving either way?

A. I got out of the car and got up to him before any cars came near us.

Q. This was afterwards?

A. Yes.

Thus, it will be seen that the question is *when* the cars were travelling on Fourth Street, at the time the defendant drove onto Fourth Street from a stopped position or later, after she had made her turn and was progressing to the east on Fourth Street. This distinction is not fairly shown in plaintiff-petitioner's Statement of Facts and Appendix D.

Similarly, the assertion about the distance from the intersection at time of collision as shown in petitioner's statement and appendix shows that Judith Arnold was not asked in the statement taken from her, how far she had travelled on Fourth Street; that is, forty or sixty feet or whatever distance it was, when the collision occurred, and furthermore, did testify at the trial, that

> "when I pulled onto Fourth Street as I did, I hit him."

Thus, it appears that the purported conflict resolves itself merely into what was meant by the witness when she said she was pulling onto the street.

Similarly, a perversion of the facts is shown in petitioner's Statement of Facts where it is contended that in the statement taken from her, that Judith Arnold's attention was diverted when she looked to see if she had cleared a parked car on the southeast corner of Fourth Street at its intersection with Schuyler Street, and where the point is made that at the trial she testified that nothing had diverted her attention. A fair reading of the alleged impeaching statement taken from her and of Respondent's Appendix A shows that there was really no conflict, that the whole question was *when* her attention was diverted at the time she started from a stopped position to pull onto the street as she started to make

her turn, and not just before and at the time of the collision with the pedestrian. This is illustrated by reference to Respondent's Appendix C, "when she got to Fourth and Schuyler, she stopped, she was going to go east, she looked to see what he (the car coming out of the parking lot) was doing. He had already gone ahead of her." This does not mean that her attention was diverted at the time of and just before the collision, when the actual collision was as much as sixty feet east of where she was making her turn.

Similarly, in petitioner's Petition the point is made that in the statement referred to, the defendant said she hit the pedestrian with the front of her vehicle and that she testified at the trial that he walked into the side. This, in reality, is a play on words and a fair examination of Mrs. Arnold's statement taken and examination of her testimony at the trial shows that the two were consistent in that she testified that the initial point of impact with the car was at the bumper, and the left headlight (RA-A, 1-9). As shown in Respondent's Appendix RA-C, 3, the pertinent questions and answers are as follows:

> Q. The initial point of contact with the automobile would be where?
>
> A. Right close to the headlight, he would have hit my bumper about his knee.
>
> Q. The headlight and the bumper?
>
> A. Yes, right on the edge of it.
>
> Q. Was this man crossing straight across the street?
>
> A. No, diagonally, and he hit on the corner of my car.

Similarly, as to the point as to the place of collision on the car, a fair examination shows that the point was

made in the evidence as herein shown that the point of contact was at the left part of the left front of the bumper and at the headlight, and that the argument was that there were no marks on the front of the car.

Again, contrary to contention made in petitioner's Appendix D, reference to respondent's Appendix A shows that Judith Arnold did not testify that after the plaintiff landed on the pavement, he did not move from that position, but stated simply at one part of her testimony, that "he started to get up and a pedestrian came over and pushed him down and told him to lay back down." Reference to her testimony at time of trial shows that in another part of her testimony that is, immediately after the impact, when she was getting out of her car, that she saw the pedestrian getting up from his hands and knees and that he got up and moved to the front of the car. (See Rec. 510, 511);

> Q. Judith, what was he doing when you saw him on his hands and knees there?
>
> A. He was trying to get up.
>
> Q. What did he do?
>
> A. He got up and moved to the front of my car. About that time, there were several people who came over and helped the plaintiff. One man helped him down to the pavement.

We could go on detailing the inaccuracies and unfairness of the plaintiff-petitioner's Statement of Facts to this Court, but the above is illustrative and suffice to say, that a fair reading of respondent's Appendix A bears out the point that throughout the Statement of Facts, as set forth in his Petition, the plaintiff-petitioner gives a truncated, grossly inaccurate picture and the reference to the methods used as to defendant-respond-

ent's testimony is characteristic as to the unfair selectivity and quotations as to the argument made by defendant-respondent's counsel bearing on the true facts as argued before the jury and a reference to the full argument as made by defendant-respondent's counsel clearly shows the weakness of plaintiff-petitioner's position in that regard.

For example, to take the testimony of Dr. Scanlon as set forth on A30 of petitioner's Appendix where a portion of defense counsel's closing argument is illustrated, the petitioner omits entirely from his Statement of Facts the testimony of Dr. Scanlon as shown in respondent's Appendix RA-A, 6, 7, as follows:

> "He made a good recovery from the fibula fracture and there was no disability. It was my opinion when I examined him on September 27, 1965, that is, as regards all of his injuries including the back injury, that he would have no permanent disability."

REASONS FOR DENYING THE WRIT.

I.

This was a relatively simple case on the facts and was determined by a jury with adequate instructions. No point is made that the jury were not adequately instructed. The exclusion of the use of the statement taken from defendant-respondent, at the trial of the cause by the trial Judge, does no more than confirm the rules of discovery and the Canon of Ethics.

As set forth in the Opinion of the Appellate Court, the authorities relied upon by petitioner are not applicable and as pointed out, to permit the use of said statement and the conduct of plaintiff-petitioner would destroy the orderly rules of discovery.

II.

It was not prejudicial error to exclude from the evidence the statement taken from defendant by plaintiff's private investigator at a time when both sides were represented by counsel and defendant's counsel had not been notified that the statement was being taken.

a. The statement was taken in violation of the Canons of Ethics.

b. By taking a statement from defendant without notifying defendant's counsel, plaintiff violated the Supreme Court Rules concerning discovery.

c. Under Supreme Court Rule 201, the Trial Court had discretion to make any order that would further justice, and the Court did not abuse its discretion in this case.

d. The testimony of defendant at trial and her answers to the questions of plaintiff's investigator

were not inconsistent and contradictory when read in proper context, and would have had no effect on the verdict if plaintiff would have been allowed to use it.

e. Allowing use of a statement obtained from a party without notification of that party's counsel would hinder orderly discovery procedure.

Canon 9 of the Canons of Professional Ethics of the Illinois State Bar Association and Section 11 of the Code of Trial Conduct of the American College of Trial Lawyers are identical:

> "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his consent. He should avoid everything that might tend to mislead a party not represented by counsel, and he should not undertake to advise him."

Two opinions of the Illinois State Bar Association Committee On Professional Ethics are also relevant to the problem of the instant case. Opinion 163 states that one co-defendant's attorney cannot deal directly with another co-defendant represented by counsel, and that an attorney representing a purchaser cannot deal directly with the seller, who has been represented by counsel, even after a sale has been consummated. Opinion 108 states that a copy of a letter to opposing counsel should not be sent directly to the client without the full knowledge and consent of opposing counsel.

The statement taken from the defendant by plaintiff's investigator on August 30, 1966, was in flagrant violation of the Canons of Ethics in that pleadings were on file

and counsel for both parties had entered their appearances at the time the statement was taken. The statement itself indicates that the individual who took the statement did not introduce himself as to whom he represented. Without touching the question of whether anything in the statement was of an impeaching nature, a party should not be allowed to receive the benefit of such unethical conduct.

Plaintiff's method of pre-trial discovery was in direct contravention of the discovery rules promulgated by the Supreme Court. If plaintiff had wanted defendant's version of the occurrence, he need only have given notice that he desired to take the defendant's deposition. But as Supreme Court Rule 206 specifically provides:

> "A party desiring to take the deposition of any person upon oral examination shall serve notice in writing a reasonable time in advance on the other parties."

In effect, plaintiff was taking defendant's deposition when the statement was obtained on August 30, 1966, but plaintiff's method was in violation of Rule 206 because he failed to give proper notice.

Plaintiff contends that there is no law which prevents anyone from speaking to a party litigant. There are, however, the Supreme Court Rules which provide the methods for discovery and which provide further that depositions may only be taken pursuant to proper notice.

It may be argued that in some cases civil courts have held admissible evidence obtained by illegal searches and seizures. However, those cases are concerned either with tangible, inanimate objects which were obtained by one or more devious means, or with statements obtained be-

fore a law suit was on file and counsel had entered appearances. Plaintiff has cited no case which holds that statements may be elicited from a party without proper notice being given to that party's counsel.

The orderly and efficient administration of justice requires that discovery be carried on according to Supreme Court Rules.

Illinois Supreme Court Rule 201 (c) (1) concerning protective orders provides:

> "The court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression."

It is evident from Supreme Court Rule 201 that the trial court has the discretion to make any protective order as justice requires.

As the court said in *Coutrakon* v. *Distenfield*, 21 Ill. App. 2d 146, 157 N.E. 2d 555, (First District, 1959) at page 153:

> "They (the Supreme Court Rules) are designed to insure that the outcome of litigation shall depend on its merits in the light of all available facts rather than on the craftiness of the parties or guile of counsel. And, while the discovery is intended to be broad and complete, the Rules provide certain safeguards which are available to a party if it is feared that the discovery transcends the basic purpose of the Rules."

In that case, defendant and his counsel would not cooperate when plaintiff attempted to take defendant's deposition. The court, pursuant to Rule 90-12 (now Rule 201 of the Rules of the Supreme Court), entered an order

striking the defendant's pleadings and entered judgment for plaintiff. On appeal, the Appellate Court affirmed the action of the trial court and denied defendant's motion to vacate.

Further evidence of the trial court's discretion in discovery matters is *Stowers* v. *Carp,* 29 Ill. App. 2d 52, 172 N.E. 2d 370 (Second District, 1961) wherein the trial judge ordered that the deposition of the six year old plaintiff could not be taken because he did not sufficiently understand the matters in issue.

In his brief plaintiff cites five different instances of statements made by defendant Judith Arnold which he claims are contradicted by statements made by her to his private investigator on August 30, 1966.

Plaintiff asserts that the jury was deprived of knowledge, necessary to the complete ascertainment of the truth, because he was not allowed to use the alleged contradictory statements to impeach the defendant. However, a reading of the entire record of the trial indicates that the defendant's statements either were not contradictory or were in agreement with the plaintiff's testimony.

In addition, after having taken the statement on August 30, 1966, plaintiff took the discovery deposition of the defendant. No mention was made at that time of any inconsistencies in the defendant's version.

Following are the five instances of contradiction alleged by plaintiff:

1. Plaintiff alleges error in that he was not allowed to impeach the testimony of the defendant that she could not see the plaintiff in the westbound lane because the plaintiff had darted out between vehicles passing to the

west immediately prior to the impact. However, the plaintiff, Edward Bruske, gave testimony in agreement with the defendant. The plaintiff testified as follows on direct examination; (Record 377)

Mr. Ozmon: Q. When you got over to the curb, when you got to the curb, what was the next thing you did then?

A. I waited for the westbound traffic to ease up.

Q. Approximately how many cars did you wait for?

A. About five or six, about five. Five or six cars.

Q. Then what did you do?

A. Well, then when the last car passed me I proceeded—I looked to my left, there were no more cars coming, and I stepped off the curb and I got to the center line—

2. Plaintiff also alleges that defendant, in the August 30, 1966, statement said that her attention was diverted when she looked to see if she had cleared a car parked on the southeast side of Fourth Street. However, if the questions asked of the defendant are read in sequence, it indicates that the private investigator was attempting to lead the defendant. The relevant portion of this statement is as follows: (RA-C, 1-9)

(Investigator Couet): Q. I am trying to think of something that might have obstructed your vision. Your car was the car that came out of the lot first, and you made sure he had cleared?

A. He had gone, his taillights were almost onto Fourth Street when I started to turn slowly.

Q. What object was your eyes on, what was your concentration on at that time?

A. Oh, I can't remember really.

Q. There were no other people crossing?

A. No, I had looked on the other side of the street, and it was dark over there, and I could see the

parked cars there, and there were several people up by the show there.

Q. You noticed it was (while, sic) you were making your turn?

A. Yes, I tried to look both ways because of that, and I had no recollection of anyone standing close to the curb, even start across the street. The only thing I could think of that might have diverted my eyes was to see if I had cleared the car that was parked there.

The entire sequence of questions indicates that defendant was trying to be cooperative and was groping for something which might have caused her to be diverted. But in essence, her statement agrees with her testimony at the trial that her eyes were always on the westbound lane.

3. Plaintiff alleges further that in the statement taken August 30, 1966, defendant stated that that impact occurred as she was making her turn onto Fourth Street, while at the trial she testified the impact occurred forty to sixty feet east of the intersection.

A more complete presentation of the statement taken from the defendant indicates that it was her testimony that the impact occurred when her headlights were even with a driveway that entered on Fourth Street. The relevant portions of this statement:

(Investigator Couet): Q. The obstructions at that time, if any, could have been cars if there were any parked along the curbing, or cars parked in the Dairy Barn at the corner, the southeast corner where the parking area is. We have asked the witnesses to tell us if they can what was in the parking lot. Do you recall what was in the parking lot?

A. There were quite a few cars, I can remember that, because I know when I went out the west en-

trance of the parking lot, there was one coming out of the north entrance.

Q. Onto Fourth?

A. And I quickly glanced to see if he was going to stop and he had already gone out of the parking lot.

Q. When you got to Fourth on Schuyler there is a stop sign?

A. Yes, I stopped, and I was going to go east and I looked to see what he was doing, and he had already gone ahead of me, and then I pulled onto Fourth and as I did I hit him.

Q. How about traffic coming on Fourth, was there any at that time?

A. No.

Q. You were clear to make your turn?

A. Yes.

Q. How far from the crosswalk, I don't know how those lines were at the time, whether those pedestrian lines were there at the time, but using that as the point, the crosswalk lines going across the street on the east side of Schuyler, how far would you estimate your car moved before contact with the man?

A. Before the driveway.

Q. The driveway the man had come out on?

A. Yes.

Q. There is a sidewalk and a break where the driveway came out along there?

A. Yes, my headlights were right even with the driveway.

Plaintiff's witness Rodda testified that the distance from the driveway where defendant said the impact occurred is long enough that a car can park between the entrance and the corner and that there is a parking meter at that point. (Record 180)

Plaintiff's inference seems to be that as defendant started onto Fourth Street, the impact occurred. This is not so, obviously, in view of her statement that the impact occurred when her headlights were even with the driveway.

4. Petitioner's further point is that defendant stated to his private investigator that she hit the plaintiff with the front of her vehicle. However, in the statement defendant was asked *about where* the initial point of contact with her automobile was. She answered, "right close to the headlights, he would have hit my bumper, about his knee." Earlier in the same statement, defendant stated that the first time she saw the man he was already hitting the windshield. That was exactly her testimony at the trial.

There would seem to be nothing impeaching about her answers in the statement because nowhere did defendant say that she hit the plaintiff with the front of her vehicle, as plaintiff's brief alleges.

5. Petitioner contends further that defendant's testimony at trial on the question of whether the plaintiff got up and moved to the front of the car was contradictory to the statement taken August 30, 1966. However, when defendant's testimony at trial is read in proper sequence, it is evident that her testimony is essentially no different from her earlier statement. The relevant portions of defendant's testimony at trial are as follows: (RA-A 9)

> Mr. Kelly: Q. When you saw him where was he?
> A. Well, he was on his hands and knees beside my car.
> Q. What part of the car was it?
> A. The left front wheel.

Q. The left front wheel?
A. Yes.
Q. Judith, what was he doing when you saw him on his hands and knees there?
A. He was trying to get up.
Q. What did he do?
A. He got up and moved to the front of my car.
Q. Were there any people, any other persons that came over there to the scene of the accident about that time?
A. Yes, there were several people that came over, I don't know from where. There were several people that came over there and helped him.
Q. Judith, what did these people do as far as helping this man?
A. One man helped him down to the pavement.
Q. What was said, was there anything said by these individuals or by this man at that time?
A. They asked him how he felt.
Q. Let me ask you, when he was on the pavement, about where was he located?
A. In front of my car, just a little to the left.

It is thus evident that when both defendant's testimony at trial and the statement she gave to plaintiff's private investigator are read in proper context, there are very few contradictions or inconsistencies. Even if plaintiff had been allowed to use the statement at trial, its effect as impeachment would have been minimal.

The discovery rules of the Supreme Court of Illinois are a comprehensive set of rules designed to provide an effective and broad discovery deposition practice. Joint Committee comments indicate they were patterned after comparable Federal Rules of Civil Procedure. They have been designed to displace what has been called the "sporting" concept of a law action which all too often charac-

terized the former practice. See *Coutrakon v. Distenfield*, supra.

It is not necessary to cite specific authority to proclaim the principle of rules of orderly procedure as to exclusion of evidence improperly obtained. Where, for example in the criminal field, evidence obtained in an unlawful search and seizure is excluded, it could be argued in the single individual case that justice would be better served if such evidence is admitted, that the need for justice, (as argued by petitioner here) transcends and overcomes the exclusion because of the wrongful search—or here the violation of ethics and of the spirit of Supreme Court rules. But if we were to heed such argument, orderly procedure would deteriorate into a jungle of unethical unlawful practices. Other examples are the exclusion of an evidence deposition because of failure of notice—the exclusion of the testimony of a witness, when the party calling such witness has failed or refused to list the witness in pretrial answers to interrogatories. In many cases the failure or wrongful conduct of counsel has resulted in exclusion of evidence that would help the justice due his client, or help the prosecutor for the people, but if we were to permit such wrongful failures or practices, the harm to the general cause of attainment of justice, would be much greater than the isolated instance of harm in the individual case. Breakdown of rules of order and procedure never helps justice in the long run.

To allow a party to receive the benefit of evidence obtained in the manner in this case would lead to all kinds of devious methods being pursued prior to a trial. It would cause discovery procedures in Illinois to revert

back to a game of "hide and seek" and subvert the reasons for the adoption of broad discovery rules. It would give advantage to those who would pursue investigation by underhanded means.

Had the contents of the statement in question been obtained by proper means, and had it been used to attempt to impeach the defendant, its effect would have been small; and it certainly would not have changed the jury's verdict.

III.

Furthermore, Petitioner failed to request rulings by the Court at the time of objection, failed to request the Court to instruct the jury to disregard the alleged improper conduct of counsel for defendant or to rebuke counsel for the defendant, and failed to move for a mistrial.

Before examining the contentions of the Petitioner concerning any improper conduct of defendant's attorney during closing argument, it is the duty of the Court to determine if these issues are properly before it for review.

Counsel for Petitioner cites numerous examples in his brief (A. 20-A. 32) of what he believes to be improper and prejudicial argument by defense counsel. He seeks to have this verdict overturned on the ground that these remarks by counsel were so damaging that the plaintiff was denied a fair and impartial trial. However, an examination of the Record reveals that attorney for plaintiff objected only twice during the entire closing argument of defendant. (RA-B 20, 21) and (RA-B 28, 29). On these two occasions counsel for plaintiff did not ask for a ruling by the court, did not ask that the court instruct the jury to disregard the remarks of counsel for defendant,

did not ask the court to rebuke counsel for defendant; and at no time moved for a mistrial.

It is well established in Illinois that such alleged errors must be preserved for review by timely and proper objection and actions in the trial court. *People* v. *Switalski*, 394 Ill. 530, 69 N.E. 2d 315 (1946); *Chicago City Railway Co.* v. *Gemmil*, 209 Ill. 638, 71 N.E. 43 (1904); *Lindroth* v. *Walgreen*, 338 Ill. App. 364, 87 N.E. 2d 307, Aff. 407 Ill. 121, 94 N.E. 2d 847 (1950); *McElroy* v. *Force*, 38 Ill. 2d 528, 232 N.E. 2d 708 (1967).

In the leading case of *Lindroth* v. *Walgreen*, the Illinois Supreme Court stated, at page 136:

> "No objection was made at the time the argument was made nor was the court requested to take any action regarding the remarks until the verdict. This question is not open for consideration in this court in such case."

Courts of Appeal have followed the *Lindroth* case and ruled on this issue on several occasions. In *Andres* v. *Green*, 7 Ill. App. 2d 375, 129 N.E. 2d 430 (3rd Dist. 1955), this Court held that the defendant's failure to move for withdrawal of a juror when counsel for plaintiff made improper remarks precluded review of that issue. In *Pearmon* v. *Morris*, 15 Ill. App. 2d 486, 146 N.E. 2d 589 (3rd Dist., 1957), there was a clear misstatement of the evidence by counsel for plaintiff about a material issue of fact. In disposing of this issue, the Court stated at p. 499:

> "Counsel for defendant-appellant objected to the statement, but the record fails to disclose any ruling or instruction by the Court. Under the authority of *Andres* v. *Green*, 7 Ill. App. 2d 375, the defendant-appellant, by failing to move to withdraw a juror,

waived the error and cannot complain of it at this time."

The reasons for this well grounded rule of law were discussed at some length in the Appellate Court opinion in *Lindroth* v. *Walgreen,* supra, at pp. 383-384:

> "The Court was not asked to rule upon anything nor was the court requested to instruct the jury to disregard any remarks. Now, the defendants, in a search for error, contend that the argument of the attorney for plaintiff was so prejudicial that if the defendant had objected to statements in argument at the time they were made nothing that the court might say in ruling upon the objections could remove the prejudicial effect of the argument upon the jury. If the alert attorneys for the defendants felt that way during the argument, they would have undoubtedly exercised this right to move for withdrawal of a juror. The only reasonable inference that can be drawn from their conduct is that they were willing at the time to gamble upon the verdict of the jury. The law bearing upon the instant contention has long been established."

The court went on to point out that, although it is the duty of the trial court to control the proceedings even without objection, the trial court must be given an opportunity to remove any taint of prejudice by proper instructions.

If the courts allow a party to raise issues on appeal concerning improper conduct of counsel at trial, to which no objections have been raised, it would make it advantageous for litigating attorneys to draw their opponents into error and remain silent when such conduct occurs. This would rob the trial judge of the salutory assistance

of vigilant adversaries in controlling one another and maintaining orderly and dignified proceedings.

There is an exception to the general rule stated above, namely where the conduct of counsel is so inflammatory and prejudicial that the parties litigant cannot receive a fair trial and the judicial process cannot stand without deterioration. *Belfield* v. *Coop*, 8 Ill. 2d 293, 134 N.E. 2d 249 (1956); *Chicago* v. *Pridmore*, 12 Ill. 2d 447, 147 N.E. 2d 54 (1957); *City of Quincy* v. *V. E. Best Plumbing & Heating Supply Co.*, 17 Ill. 2d 570 (1959).

The instant case clearly does not fall within the standards set out in those cases. In all of those cases other errors required reversal and were compounded by the trial court's failure to maintain control over flagrant abuses by counsel.

The Petitioner does not contend that the alleged improprieties charged in this case fall within this exception to the general rule, and has not cited any of these cases in this brief.

IV.

The Court did not abuse its discretion in the regulation of the proceedings and the conduct and argument of counsel.

Had the Petitioner properly presented to the trial court the issue of the alleged improper and prejudicial conduct of counsel for defendant by moving for a mistrial or a new trial, the appropriate test that this court should apply would be whether or not the trial court had abused its discretion in denying such a motion. *City of Monticello* v. *LeCrone*, 414 Ill. 550, 111 N.E. 2d 338 (1953), *Brayfield* v. *Johnson*, 62 Ill. App. 2d 59, 210 N.E. 2d 28 (1965). The

Petitioner having failed to properly preserve these issues in the trial court has also failed to properly present them for review.

An examination of the Record discloses that there was no abuse of the discretion of the court in regard to the matters objected to and even in regard to the matters which plaintiff failed to object to and now attempts to raise.

The Petitioner contends in his brief that plaintiff was irreparably prejudiced by certain comments by defense counsel in which members of the jury were allegedly asked to place themselves in the place of the defendant. Plaintiff objected only once and at that point the court cautioned the jury as follows:

> "The jury will decide this case on the evidence which has been admitted and the law as I instruct the jury, nothing else. Proceed." (R. 643, A.A. 20)

Nowhere in the plaintiff's brief or Abstract of Record are the cautionary remarks of the court to the jury set forth. The plaintiff by mixing statements to which objection had been made with those to which there were no objection and deleting the court's ruling, as well as taking statements out of context has presented an unfair and distorted picture of what happened in the trial court. The entire closing argument is set out. (RA-B 13 to 34). Only by examining the entire argument of both parties can the Court reach a conclusion concerning the trial court's possible abuse of discretion. Furthermore, the Illinois Supreme Court has warned of the danger of substituting the judgment of the Appellate Court for that of the trial court in such matters. *North Chicago Street R. Co.* v. *Anderson*, 176 Ill. 635, 637, 52 N.E. 21 (1898).

In that case it was pointed out that the trial judge is in a much better position to determine if conduct of counsel renders it impossible to obtain a fair and impartial trial than is the Appellate Court. The failure of the plaintiff to move for a mistrial, raise objections or ask for instructions to the jury raises an inference that plaintiff's counsel did not consider the conduct of counsel for defense to be inflammatory and prejudicial to the jury at the time.

In the case of *Copeland* v. *Johnson*, 63 Ill. App. 2d 361, 211 N.E. 2d 494 (1955), which petitioner cites as support for his contention that it was error for the trial court to allow an attorney to ask members of the jury to place themselves in the place of a party, the courts refused to reverse the trial court even though several such statements had been made. The Court stated in that case, at p. 368:

> "Able counsel may prefer to permit slight error or informality of procedure or argument by opposing counsel to take place without objection in order to take advantage of it later in his own argument. Having done so he may not later complain of the permitted error 'for reason that an objection and ensuing colloquy could serve only to emphasize the prejudice of counsel by the remarks' as stated in his briefs."

Counsel for plaintiff had the opportunity to close the final argument and took advantage of that opportunity to dispute the contentions as to evidence made by counsel for the defendant as well as to attack counsel for defendant for "pettifogging" the evidence. (Record 668, 679, 681 and 685)

The only other point which was objected to in the trial court concerning argument of defense counsel was

his statement concerning testimony of the plaintiff. The argument objected to was as follows:

> (Mr. Kelly): What does he say: I will repeat this to you: "I looked to the left and I saw a string of cars coming. I waited until they went by, and then I stepped out. I had to step fast. It's hard to get across. I didn't see the car until the instant of the collision. I don't know where it came from. I didn't look to the right as I started to cross there."
>
> (Mr. Ozman): Your Honor, I object to that as a gross misstatement of the evidence.
>
> (The Court): The jury heard the evidence. Proceed. (R. 657, RA-A 28, 29)

On cross examination, Mr. Bruske testified as follows (RA-A 7)

> Q. When you started across the street you looked to your left, is that it?
>
> A. Yes, sir.
>
> Q. When you started to walk out behind that last car, you never looked to your right, did you?
>
> A. What?
>
> Q. You never looked to your right at the time when you started out there?
>
> A. No, I was looking for the westbound traffic.
>
> Q. You didn't look to your right for the eastbound traffic at the time?
>
> A. No, not until I got to the center line.
>
> Q. You never looked to it, is that correct?
>
> A. I might have looked.
>
> Q. You testified today, I believe, for your own lawyer, didn't you; you just told me you looked to your left, is that right?
>
> A. To my knowledge I just looked to my left when I stepped off the curb.
>
> • • •
>
> Q. Is it true you first saw this car which you learned was driven by the defendant Mrs. Arnold,

you first saw that car at the instant of the collision?
A. Yes, sir. (RA-A 7) (Record 406)

• • •

Q. Mr. Bruske, when you stepped out into the street, out into the center of that street, or walking across there, were you moving at a fairly steady pace? (RA 7) (Record 407)
A. Steady pace?
Q. In other words, you were walking right along, is that right?
A. Yes.
Q. In fact, were you walking a little bit faster than normal?
A. You more or less have to.

• • •

Q. At this time you tell me you looked to your left, when you crossed there you still walked at a fairly fast pace to get there?
A. Yes. (R. 408)

It is obvious that there was a dispute concerning the testimony offered by the plaintiff. Attorney for the defendant was referring to admissions and statements made during cross examination by the plaintiff. The defendant is certainly not confined during closing argument to the evidence offered by the plaintiff on direct examination. The contention that this comment was contradictory to the evidence is false.

Although defendant failed to object to other alleged errors and alleged misstatements and is, therefore, precluded from review of those points, it may be instructive for the court to examine the manner in which these issues have been presented.

Petitioner's brief charges that counsel for defendant inferred in closing that the plaintiff had been drinking

in the tavern after admonishment by the court not to refer to possible drinking. The only reference to the tavern in closing argument by defense counsel was the following:

> "However, he went into this tavern; we didn't know how long he was in there." (RA-B 28)

During direct examination of the plaintiff by his own attorney the following testimony was elicited:

> Q. Do you know the place that you went to to get the cigars?
> A. It's a tavern.
> Q. Do you know the name of the tavern?
> A. I know the name of the people who own it.
> Q. Who is that?
> A. Mr. and Mrs. Shaller. (R. 373)

It would appear that the plaintiff placed in evidence testimony about the tavern and should not be heard to complain about defense counsel's passing reference to it in closing argument.

Elsewhere in his brief the Petitioner has attempted to characterize the legitimate comments of counsel for the defendant as improper and as personal attacks upon the attorney for the plaintiff. The comments of counsel for defendant comparing the testimony elicited by plaintiff with certain impeaching statements made by various witnesses are characterized as attacks upon the attorney for plaintiff, apparently because the attorney for defendant made references to the attempts of plaintiff's counsel to elicit certain facts from these witnesses. Such statements by defense counsel are fair comment upon the credibility of witnesses and conflicting testimony. In the infrequent situation where there is some discrepancy the Petitioner has omitted in his brief other testimony by

witnesses which was relevant. For example, Petitioner charges defense-counsel with making false statements as to what the witness Raymond Rodda said concerning plaintiff's counsel's statements to the witness. Although Petitioner's brief sets forth only the statement of the witness that he was not told not to talk to the counsel for defendant, the record reveals several statements by the witness that he was told that he did not have to talk to counsel for defendant and that witness had in fact refused to discuss the case with counsel for the defendant. (RA 2)

Petitioner has failed to establish that there were any significant improprieties in the remarks of counsel for defendant during closing argument; failed to properly preserve the alleged errors for review, failed to give the trial court an opportunity to correct the alleged error. Finally, even considering those issues which Petitioner has improperly urged upon this Court, it cannot be said that the trial court abused its discretion in regulating the conduct of the trial or, in fact, that plaintiff was denied a fair and impartial trial.

CONCLUSION

Wherefore, the defendant-respondent prays that the Writ of Certiorari to the Supreme Court of State of Illinois be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX A

Page of Record

213-214 Impeachment of witness, RAYMOND RODDA by Mr. Kelly on statement given by the witness to an investigator for Mr. Ozmon, plaintiff's attorney, on April 21, 1965.

Questions by Investigator for Mr. Ozmon

Q All right. Just tell me what happened.

A. Well, the man was on the north side of the street coming south, and this woman I believe—I can't remember but I think it was a Pontiac, I'm not sure what the make of the car was—she was coming east, and this man was walking, I don't think he seen the car or anything, and he walked in front of it, and she hit him. He flew up onto the car, onto the hood, with his legs down on the ground and then rolled. If she had been going fast, she would have went right over him. But he rolled down in front of the car.

[RESPONDENT'S APPENDIX A]

Question by Mr. Kelly.

Q. Did you say that?

A. Yes.

215 Witness: This lady was going very slowly, I would say about 15 miles an hour.

218-219 The witness knew the intersection, knew there were clearly defined crosswalk lines at that intersection and that the man, when he left the curb, wasn't walking anywhere near the crosswalk but was a considerable distance east of it, 20 feet east of it, and walking in a southeasterly direction, so that his body was turned away from the car.

221-222 Witness: When Mr. Ferracuti, in the hall of the courthouse, asked the witness to talk to him about the case, he told Mr. Ferracuti that he wouldn't talk to him. The gentleman working for Mr. Ozmon told the witness that he didn't have to talk to Mr. Ferracuti.

He told the witness that he didn't have to talk to the witness, Walter Reese and Kurt Tregoning.

228 *Further Impeachment of the Witness by Defense.*

The witness was shown a statement taken June 9, 1965, that the man had crossed about 20 yards east of the crosswalk. He denied that statement, said it was about 20 feet.

[RESPONDENT'S APPENDIX A]

276 *Impeachment of the Witness by Mr. Kelly.*

Q. On August 30, 1966 when you gave a question and answer statement to a Mr. Estridge, representing Mr. Ozmon, did you say, "Yes, I had just put the car in park when I saw the man roll over on top of the hood. I had seen him get out of his car previous to this"?

A. That was an assumption on my part.

279 She was making her turn, it couldn't be more than 10 miles an hour. She was at a stop.

280 *Further Impeachment by Defense.*

The witness admitted making statements to Mr. Estridge, representing Mr. Ozmon as follows:

Q. About what would her speed have been at the time this occurred?

A. Between five to six miles an hour.

282 The witness further admitted making a statement to Mr. Estridge, Mr. Ozmon's representative, as follows:

Q. He could be seen clearly because of his clothing?

A. I'd say it would be probably be difficult to see with his clothing. It is more or less an alley between Happy's Tavern and an apartment house, and it is usually dark—dark setting, and I guess he went swinging around there and could probably be seen not too clearly.

285 The alleyway there is usually dark.

286 Q. By Mr. Kelly: How would you describe the visibility where that man was as far as the capability of his being seen when you saw him start out across the street?

[RESPONDENT'S APPENDIX A]

A. I couldn't see him very plainly.

291 I did make the statement in June of 1965, that I saw Mr. Bruske crossing Fourth Street about one and one-half car lengths from the crosswalk.

293 That would be much closer to the alley than the point I mentioned when Mr. Ozmon questioned me.

WALTER REESE, Witness:

Impeachment by Defense.

317-318 The witness admitted making the answer to Mr. Estridge's question on April 8, 1965, as follows:

Q. About where in reference to the intersection of Fourth Street and Schuyler Street?

A. Oh, I would say—there's Giese's Paint Shop right across the street and I would say he was approximately across from there.

322 The man was walking across the street at an angle.

326 Motion of defendant to suppress use by plaintiff's attorneys, of a prior statement taken by plaintiff of defendant.

By Mr. Kelly: Your Honor, I have here a copy of a transcript of a statement taken from Judith Arnold at her place of residence, 921 Rock Street, Peru, Illinois, on Tuesday, August 30, 1966, in the form of a question and answer statement, which was taken by the plaintiff through their counsel, reported by a Raymond S. Estridge, which was done for Mr. Ozmon, who represents the plaintiff.

Your Honor, this shows that they contacted her and that they took a question and answer statement and asked her about the accident at that time, that is, counsel for the plaintiff, and also knew that Mrs. Arnold was being represented by an attorney.

[RESPONDENT'S APPENDIX A]

327 They had before that time filed suit, and I believe the file will show that an answer had been filed, and that a copy was sent to plaintiff's counsel, and that they knew I was in the case and that she was represented by counsel.

Your Honor, in view of that fact, I consider it very unethical and entirely against the ethics of the profession for them to contact this lady when she was being represented by counsel and they knew it—the contact having been made on August 30th.

In view of that, your Honor, I move that any effort on their part to use in any way, this transcript of the statement taken from her be excluded by the Court and that they be instructed that they cannot refer to it or use it in any way.

Mr. Ozmon: Your Honor, I know of no rule of Court or evidence that prevents a private investigating firm from talking to anybody involved in the case if the particular party cares to talk to them. This particular statement was taken by Cy Couet, a private investigating firm.

328 The Court: Are you sure?

Mr. Ozmon: Yes, your Honor, he was employed contractwise for my firm, and not only saw the defendant, but everybody who had any involvement in this case whatsoever at all in this particular case.

The Court: You think it is proper to make a direct contact of an opposing party when you know that that party has counsel?

Mr. Ozmon: Your Honor, it is done to us all of the time.

The Court: No, sir, you sue somebody and they retain counsel, the ethics of the profession requires that

any contact with that person be made through their attorney, or at least with notice to their attorney.

Mr. Osnos: Your Honor, I am not going to argue with you concerning the ethics of the profession as far as I'm concerned, and what is admissible and what is not admissible in Court or in a court of law might be two different things. Where there is a voluntary statement made by a party to the case to anybody at any time if the same should become material to the issues of the case, but whether it does pass that it should become material, any use of the court reporter's statement made to anyone would be admissible in this Court.

The Court: As I understand the ethics of our profession, if what you are suggesting is true, it would lead to absolute deterioration of our profession.

There are times when even the seeking after truth must be deferred to the protection and promulgation and continuance of what is best in the profession.

Mr. Osnos: Even to the detriment of the truth, your Honor?

The Court: Let me say this: Yes, I will not permit you to use any evidence that you secured in this way. I will allow this Motion.

I have never in my practice every seen anything like that. This may be in Chicago, but not down here. Once the other party has a lawyer you must deal with that lawyer. A witness is something else. I have never heard of anything like this.

DR. WILLIAM SCANLON, Witness:

He made a good recovery from the fibula fracture and there was no disability. It was my opinion when I examined him on September 27, 1965, that is, as re-

gards all of his injuries including the back injury that he would have no permanent disability.

364 As to his bending over, touching the floor, he could come to four or five inches from the floor and we would not consider it bad. He is 32 years of age.

366 EDWARD BRUSKE, Witness.

I am doing the same type of work I have done for the last seven years.

376 *Questioned by Mr. Osmon*

Q. Did you leave the tavern?

A. Yes, sir.

Q. Do you know that now from hearing it in Court as Happy's?

Mr. Kelly: I object to that, your Honor.

The Court: Leading question, objection sustained.

Cross Examination by Mr. Kelly

400 When I first left the parking lot and crossed the street to the north side, I crossed on the crosswalk. I knew the crosswalk was there and it was there for pedestrians to walk on, to cross on.

403 At my deposition, I said I was about 25 feet from the crosswalk.

404 I could have walked at a slight diagonal across the street to the southeast.

405 When I started to walk out behind that car, I never looked to the right. I was looking for the westbound traffic. I might have looked when I got to the center

406 line. It is true that I first saw the Arnold car at the instant of collision.

412 There was quite a lot of traffic at the time, cars going in both directions.

[RESPONDENT'S APPENDIX A]

415 When I gave my deposition, I stated that I was about 20 feet from the last of the westbound cars when I started to cross the street.

419 I have not made any complaints to or been near Dr. Scanlon since September, 1965. I am not taking any medication. I have made no complaints of physical disabilities where I work.

JUDITH ARNOLD, witness, called under Section 60 by Plaintiff.

426 428 I was driving an automobile proceeding in a generally easterly direction on Fourth Street when involved in an automobile occurrence with the plaintiff, Edward Bruske.

POLICE CAPTAIN RAYMOND STACHOWIAK, witness called by defendant.

442 I measured a distance of approximately 60 feet from the east curb line of Schuyler Street to the point where Mr. Bruske was lying in front of the vehicle.

448 I looked at the front of the car and didn't see anything that would indicate marks or anything. I looked at the side of the automobile and I had seen scuff marks at the location of the left front wheel.

460 There were marks on the side of the fender and on the curved part of the fender toward the hood. There were marks made by dirt brushed off to the clear paint surface.

470 They were just above the trim where portion of the left side of the car.

481 I checked at the scene and at headquarters and saw the same marks. There were none on the front of the car, there were no dents or bends.

[RESPONDENT'S APPENDIX A]

JUDITH ARNOLD, Witness.

Direct Examination by Mr. Kelly.

510 When I got out of my left door, the man was on his hands and knees beside my car at the left front wheel.

511 The man was wearing dark clothes, dark brown coat and dark trousers.

512-516 Offer of proof by plaintiff's attorney by way of prior statement taken from Judith Arnold and excluded by the Court on motion of defendant.

Mr. Osmon made the following offer of proof as to questions asked defendant and statement taken from her on August 30, 1960:

Q And he actually came up to the windshield, do you know?

A Yes.

Q And then rolled forward and off?

A To the side.

Q Left front of the car?

A He started to get up and the pedestrian came over and pushed him back down and told him to lay back down.

Q When you got to Fourth and Schuyler, there is a stop sign?

A Yes, I stopped and I was going to go east, and I looked to see what he was doing, and he had already gone ahead of me, and when I pulled onto Fourth and as I did, I hit him.

Q How about traffic coming on Fourth, was there any at that time?

A No.

Q You were clear at quite some time?

A Yes.

Q. The initial point of contact with the automobile would be about where?

A. Right close to the headlights. He would have hit my ~~bumper about his knee.~~

Q. The headlight and the fender?

A. Yes, right on the edge of it.

Q. And he came onto the hood toward your windshield?

A. Yes.

Q. You had stopped there at the corner?

A. Yes, I had come to a complete stop and had waited for several cars to pass, and there was a break in traffic.

Q. There were no cars coming?

A. At least four or five blocks back.

Q. Plenty of time and you were in no hurry?

A. No.

Q. You noticed it as you were making your turn?

A. Yes, I tried to look both ways because of that and I had no recollection of anyone standing close to the curb even start across the street. The only thing that I can think of that might have diverted my eyes was to see if I had cleared the car that was parked there.

Q. There was no traffic moving eastward at this time coming at you, or headlights? There was no traffic coming the other way?

A. I feel like if there was traffic coming the other way I would have waited. As I remember the street was practically all-mine.

Q. Deserted at that time?

A. Yes.

[RESPONDENT'S APPENDIX A]

Q From the time you made your turn until the happened there were no cars moving either way?

A I got out of the car and got up to him before any cars came near us.

Q This was afterwards?

A Yes.

Mr Kelly: Your Honor, we object to the offer of proof and to the use of these questions on the following grounds:

First, your Honor, that the purported statement was taken on August 30 1950, admittedly by counsel for the plaintiff after the defendant was represented by counsel and after the defendant had filed a plead ing in the case and is already in court.

The statement itself shows that the party who took that statement did not introduce himself as to who he represented.

And furthermore, your Honor, that the questions that were asked, there was a long statement and the questions were leading questions many of them were leading questions, and Counsel did not read all of them, that he did not give a fair interpretation from the answers, having the questions read and the answers given that the questions by themselves do not impeach but when taken in context with all of them.

The Court denied the offer of proof.

The Court: In my sixteen years on the bench, I have never seen a more obnoxious breach of the lawyer's code of ethics and I would say that it is impossible and absurd to say that it is improper to communicate with another lawyer's client.

If I permit this to go on or to be used at all ultimately at the trial the customary breach the ex

(RESPONDENT'S APPENDIX A)

RESPONDENT'S APPENDIX B

COMPLETE CLOSING ARGUMENT ON BEHALF OF DEFENDANT

my client, and this is her only day in court also, and that I am representing my client in order to do justice to her it is my duty to point out everything as it occurs to me.

631 Ladies and gentlemen, on this case, Mr. Ozmon said something else, I think, and I want to quote to you from what he said. I will adopt it. When you come in here, you don't leave your common sense outside, you don't leave your common sense behind.

Now, I wish to remind you ladies and gentlemen, don't forget that during the time you are deliberating the case or listening to my argument.

Mr. [illegible] I have finished, if there is anything I have left out, Mr. Ferraiuoli may speak to you for a few minutes. But I will say this to you ladies and gentlemen, I don't have an opportunity to talk to you again. The plaintiff has a right to finish his case. We law boys have to stop talking some time, and I know that you will not be too sorry because of that.

Now, on this case, I want to say something else. I want you to be careful. There are two or three things that are important in this case, and I wish to remind you to watch here and don't get lost in the maze of [illegible] arguments which are made to you. Let us apply that again to reason.

632 Now, ladies and gentlemen, I thought it was particularly significant in this case from the outset that the plaintiff asks you or tried to give you what I thought was a deceptive view of this picture. Instead of that emphasis, nothing that was unfavorable to them. They have given you a picture here, to get this three block on the pavement or on coast to the [illegible] wall or as near to the [illegible] as they could in several [illegible].

[RESPONDENT'S APPENDIX B]

Now, in the first place here, you take the plaintiff's Exhibit No. 10, for example, and if you will recall, during the testimony in this case I asked at Curt Trevenning, "Does that give you a distorted angle?" And he said it did. Now, I ask you, just look at it. This picture is taken so that the view doesn't show you a true perspective as to the distance. Now, what difference does it make in the final analysis?

633 He wasn't in that crosswalk, and that is the only thing that counts. But his attorney, the attorney here is trying to get him back in the crosswalk. If he wasn't in the crosswalk, he was nearly close to it. That is an argument.

And I might remind you ladies and gentlemen that there is discrepancy as the plaintiff's eye sees between the distance between this crosswalk line and the car from this picture, it looks very much less than the length than the car length is really is. If you want to see how little it looks to be, why don't you take a look at this picture here [indicating].

Look at that picture, it looks like it is sitting right on the crosswalk, isn't it? You have to look at this picture in my hand, which was taken from an angle. Here you have to look at this picture to get one idea at distance that the man was from the crosswalk, and I say to you he was not walking [illegible].

634 Now, ladies and gentlemen, I would like to say to you another thing that I noticed on cross-examination in the case. You will remember when Mr. Dimon was examined by [illegible] he was asked [illegible] adopt her testimony and recollection. I think I can quote [illegible] you will recall it was asked about [illegible]

in here (indicating), about midway of this car, and let us take it at that. But he doesn't want to take the rest of her testimony, does he?

Remember, she was asked—I will say this—Judith certainly wasn't out there and measuring a point or points as to that kind of distance. First of all, after the occurrence in question, she was rather distraught, and she certainly never claimed to be an expert on distance or feet, despite the testimony of the policeman.

She was asked, was it about in front of this car, right about here? And I believe you said you went about five feet. Would that be about at the middle of the car? If you take half of 20, that is, 10, and so on and so forth.

635 And another important thing, I think, which is a very important particular thing which you jurors must have noticed, is that in these three men which they called as witnesses here in the case, to remember this, when there were so many eye witnesses and the plaintiff called them, if you will remember, that everything is brought out by the plaintiff, in the testimony by the plaintiff.

And in cross examination, it would be a waste of time to call them back again.

You will remember that I asked these men on cross examination if you recall, what did they do? The same thing, to get your mind to think that this thing happened right back in the crosswalk or very close to it.

Now you remember here, ladies and gentlemen, that they brought in the witness Rodda, who is a young student in school down at Normal University at Normal, Illinois and asked him where it happened, where
636 it occurred. They asked him, was he walking across

the street in a normal manner. And I might remind you, if you recall, ladies and gentlemen, that that normal manner was mentioned time and time again. Was he walking across in a normal manner.

Now, I ask you, wasn't that always the question? I must have objected. It was a leading question. I think you can understand that as to the power of suggestion, especially to young people, and it is very easy to answer yes, it was in a normal manner.

But if you say to that witness "Describe the manner in which he walked across", that is different. In other words, ladies and gentlemen, it is like saying it was dark last night, was it, or was it dark last night?

What did they try to do on the question of lighting, where the Court let me ask that witness, Curt; about the question of lighting? The direct examination was,
637 well, was that well lit? Was there those neon lights there? Was there a light in the parking lot or a flood light there? The visibility, tell me what the visibility is; look at those photographs, ladies and gentlemen, they were taken in broad daylight.

What did Curt say? Well, they tried to have him testify. What did they try to testify? You would think from the direct examination it was like that the place was lit up like a Christmas tree, or floodlights.

What did he say? He had given a statement to them, by their own man, by her, and what did he say? We had to bring this out. I would say it would probably be difficult to see with his clothing. It is more or less an alley between Happy's Tavern and the apartment house, and it is usually dark, and I guess he went swinging around there and would not be seen too clearly. Doesn't that have the ring of truth about it, ladies and gentlemen? Now, I ask you, did they bring

[RESPONDENT'S APPENDIX B]

the car? Absolutely not. No, they did not. In other words, they tried—or they were trying to keep this away from the alleyway.

Now, take the witness, Kurt. Now, I remind you, ladies and gentlemen, there is no reason for this if you are bringing out the truth. They asked him where Bruske was crossing the street. They got it down to about ten feet.

Well, you know it was more than ten feet. The plaintiff himself, who certainly should be cognizant of where he crossed, told you it was 25 feet, by his own testimony.

Now, I ask you, to get it down to ten feet, for what reason? I will tell you why: To try to get it as close to the crosswalk that this man wasn't on the crosswalk, but they wanted to cloud the issues.

Now, if you remember, I had to show him the statement he gave. He said that he saw Bruske crossing Fourth Street one and a half car lengths from the crosswalk. A car length is 20 feet, so that you have 2 feet, and half of a car length, that would be 30 feet.

Now, you want to be careful of what he did. Did he walk across the street in a normal manner? That he was walking across the street like this—they want to give you this impression.

What did he say? Now, if you remember I had to bring that out, that he signed a statement within three or four months after the accident happened, when he said that Bruske was walking fast, not quite running.

Now, I ask you, what does that mean to you? It puts a different picture on it.

Now, with the witness finally they had him say that it was about ten feet from the crosswalk. Looking at the diagram, photograph ten feet from the crosswalk. Now, did he say?

[RESPONDENT'S APPENDIX B]

thing to them whether or not he recovers or not, or whether Judith Arnold recovers in her defense.

Well, I ask you what happened? And they callously admitted as to the plaintiff here, the young man sitting here that works for Mr. Ozmon when these witnesses were called out there and Mr. Ferracuti took copies of the statements out to show those boys, which is only fair, of the statements they had given us; what did he say? Don't talk to anybody. Don't talk to him. You don't have to talk to him. Stay away from him.

642 It was foolish on their part. They wanted to pervert their testimony, and I say that they didn't want to do it—that is the impulse at the moment. They had gone over these things with these boys; and this ten feet down there when they say—they having had copies of these statements, which we were compelled by rule to give to them, when they think about that they say, "Don't talk to them." Now, I ask you, is that justice?

I might remind you, Ladies and Gentlemen, that I have never in my experience in trying lawsuits told a disinterested witness that you don't have to talk to the other side, stay away from them.

Let me ask you, how would you like to be a litigant in a lawsuit and have John Doe say to you whether or not you were on trial for your life or involved in a personal injury to have the other opposing counsel go to that person and say to them, "don't talk to them. Don't tell them anything. Don't go to them at all".

643 Mr. Ozmon: Your Honor, I object to this, improper argument.

The Court: The jury will decide this case on the evidence which has been admitted and the law as I instruct the jury, nothing else. Proceed.

Mr. Kelly: Now Ladies and Gentlemen, also, with Mr. Reese, this gentleman that came in here and they want to bring into this case as to that normal walking across the street, walking straight across; they wanted to get that in here.

What did he say? If you will remember, he said that he was walking across the street at a sharp diagonal with a good part of his back, which had turned at an angle this way (indicating), that is what he said.

Now, they tried to get Mr. Reese to place the point of the impact as back in here (indicating), this ten feet from the crosswalk business again.

644 What did he say? I had to bring it out. And Reese said it was the truth, it was about across from Giese's Paint Store, that is what he said in their statement. Now, that is what they have said in their statement, and isn't a witness more likely to fix a geographical location as to feet, in other words, that is what Mr. Reese pointed out. But I had to bring that out, if you recall, Ladies and Gentlemen.

You take this picture here, you have to watch this, otherwise you can be carried away by a glib argument not founded in fact, and that is what you will decide this case on that subject.

Let us talk about this evidence a little bit more. Now, they talked to you about—I heard Mr. Ozmon talk about Judith. He wants you to adopt her testimony from where it happened, and he didn't want to adopt her testimony as to anything else.

He talked to her—if you will recall, he talked to her a considerable length of time on cross examination as to where this man was when she first saw him, as to
645 what part of the car hit him, and what she did. And again, this morning, Ladies and Gentlemen—that is

Mr. Ozmon, he says that the other witnesses don't bear her out on that.

Now, let us go back a little bit. We have this one boy here who was in the telephone booth talking on the telephone. He saw the man as he was over the hood. He finishes talking to his girl and then he calls somebody. Kurt, he runs I believe, goes inside the Dairy Bar and he called the police and the ambulance, which later arrived at the scene. Reese didn't run out there, as I remember it, right away. There would be —there were people that came there no doubt before this gentleman was removed. Nobody has their names, and you know that always happens. They didn't follow this thing and were not in a position to follow it as closely as Judith did.

It took some time for them to get out there. They didn't see her car at all until the man was on the hood.

They tried to make a lot out of it, that was erroneous, that wasn't the truth, where she said this man was when she saw him on the pavement.

646 Now, I ask you wouldn't you think that when she got out of her car she would be the first one to see him, and she said that he was on his knees right by the left front fender, and they tried to get him—

The whole thing is that this man was jaywalking across the street, that he stepped out behind a passing car, and he got hit, to give you a picture of the case as they wanted to give it to you.

Now, Ladies and Gentlemen, that is why I'm telling you this. They tried to tell you to make out, to get him in front of the car. It was when he was in front of the car—they didn't tell you that—the policeman, which you recall his testimony—the policeman put him to the left which bears out Judith's testimony

about that. That is an argument that is irreputable, can't be rejected.

What about the testimony of the Police Captain, what did he tell you? Well, remember he said that he looked the car over for marks. He would look for what part of the car and what part of the parties collided, where did they hit?

647 If you will recall, he checked the front of the car over and there were no marks on the front of that car. That is established, and it was corroborated by this lady's husband. And he said that he checked it over carefully, there were no brush marks, and that the dust on the front of the car wasn't disturbed. There were marks on the side of the car, and that is where the contact was with the pedestrian.

Now, you can take this any way you want to. Just think about it for a moment. If she hit him with the front of the car, and bear in mind in making this argument again—to bring this out again, don't hang up on that; but just to give you the character of the plaintiff's case, a split second between the car being here and here (indicating) in other words, when a man steps out behind a passing car; now, I ask you

648 if she hit him with the front of the car the brush marks would show, there is no question about that.

Now, if it was the side of the car, or walked into the side of the car there would certainly be marks and there were not there.

If the marks were on the side of the car, and it bears out her testimony, and the physical evidence here, how did he get around to the front?

Let me tell you, if he went off the front the marks would have been there. If he went off to the side marks would be there.

If he went off to the side how did he get around to the front?

Now, let me tell you that they tried—would you believe that a man with a broken leg and a bad back would walk? You must remember that you are in a moment of shock, we all recognize it. When Mr. Bruske went out there and didn't know where it had come from. That is beside the argument. It could not be expected of him to remember his actions.

649 His actions would be instinctive. And he got up and that's the way he moved, and people were there and told him to lie down.

Now let them tell you how there could be marks on the side of the car and nothing on the front, and let them answer those questions that I have put to you.

They didn't bring the Captain in here. Wouldn't you think that they would do that? You must remember that he was the man that was there and it was his duty to investigate the scene of the accident. He was totally disinterested in this case, and you would agree with me that he was a very forthright and truthful witness. Now I ask you, why didn't they bring him in?

And he was asked: "Did you make any measurements that night of the distance? Did you measure any distances?"

We had to show you it was about 60 feet from the curb line down to where the accident happened, where he found him.

650 We had to bring out about the brush marks. They didn't bring that out.

Now Ladies and Gentlemen, you see the character of the case as they are giving it to you.

Now, I want you to keep this in mind, that Judith —you follow her testimony—there was not one thing

that she tried to tell you that she didn't make sense. Just not a thing.

Was she impeached by that point where she made something to the contrary—some statement to the contrary? Not a bit.

Even when I asked her—we were talking about this, if you remember—"How far across there?" And she said she didn't know. She could have made the answer to that after hearing all the witnesses testify, and she told you exactly what she knew, and I want you to keep this in mind.

If you follow the law in this case as the Court gives it to you, and we put ourselves in the place of Judith, and we are driving down that street as she was, after having made her turn and going east, and a man steps out admittedly from behind a passing car into her path and into the side of her car, and she hit him after he stepped into her path. Now, you have the brush marks.

651 Now, I ask you, what could she have done that any person, what could she have done that she didn't do? What would any of us have done? Why do we have the rules of the road?

And if you remember correctly, I asked you this, as you were taken as jurors, that you will realize that the law applies to the pedestrian as well as it applies to the automobile. Why do we have those rules? Let the plaintiff answer that. I will tell you, ladies and gentlemen, we have those rules of the road, rules of law, to cover this type of situation, and as an automobile driver, would anyone say anything different?

We don't want you to consider Judith as a woman driver or a man driver. I don't think you will, even though you were asked by Mr. Ozmon, "Would you

652 consider the fact that she was a woman as to whether or not it would prejudice you when you deliberate on this case."

You ask yourselves this question, is there anything she did that she didn't do or that she shouldn't have done that I have done or anything to avoid the accident, and I will tell you, you will find there is nothing.

The basic picture is this, before you go any further, and before you be carried away by persuasive arguments, put yourself in this position here: Five to six cars coming down this street, and it is at night, not lit up, like the court room here, and all of you have common sense enough to know that the law requires lights on all cars, and 60 feet away from the corner, it isn't the same. Here you have five or six cars, she started to make her turn as soon as the eastbound cars went by going to the east, she drove forward.
653 What did she say? There were some oncoming cars about a block down the street. She drove forward and made her turn, she said about 30 or 35 miles an hour, that would be on the street for some time, she was making her turn admittedly at a slow rate of speed, and now you take the boy, when they asked him—Rodda, that is—he said five to six miles an hour, but she is moving, she is making her turn, but as she is going ten miles an hour, she is going slowly, and she was traveling down that street and made her turn and she had straightened out, and then these oncoming cars had gotten up to her and passed her, with the lights right in her eyes.

We know what it is to drive when cars are coming at you—and then he steps out, as he admits here, behind the last car as soon at it went by,—20 feet—he

had started out before, there is no question about that. And he steps out at a rapid pace. I thought this was significant because if you will recall, he said on cross examination, I asked him, "What kind of pace did you step out? Did you step out with a rapid pace, at a rapid pace?"

And he said, "You had to make it", that's his words.

654 Now, I ask you, do you need anything more than that? And with his back toward her, he admitted he didn't look to the right. He said he looked to the west but he didn't look to the right; he admitted that.

And he admitted also, "When did you first see this car?' And you must understand that was his sworn deposition taken in this case. It is no statement. There is no question it was his testimony, in the presence of his own lawyer, and I will call it "gobbledegook"—she being ten feet away—I am not personally saying this; maybe it is a harsh term to use—"ten feet away, and then lifted my leg up." What would he admit?

"When did you first see that car?" I asked him literally, "You didn't know where it came from?"

He said, "That's right."

655 Now, Ladies and Gentlemen, that is the basic picture. She is driving down that road, going at a normal rate of speed, at a reasonable rate of speed, and also at the same time keeping a proper lookout, looking ahead of her, and Mr. Ozmon would have you believe this, and you see everything you can see, you don't have eyes like the animals, in the back and side of our heads. You only have your own two eyes, and you are watching your driving, and you have this string of cars which goes by you, and this man steps out rapidly into the side of her car.

They want to come in here and ask you for $50,000. Now, I ask you, do the rules of the road mean anything? If the law means anything, it means only one answer in this case, and that is, as you can see it very plainly, a verdict of not guilty.

It is nice work to set those people in those circumstances, under those circumstances and conditions, and ask for $50,000, if you can get it. They didn't bring
656 those things out. We had to bring those things out and don't you forget it. Now, let us consider and take the rest of his testimony, of what he said. He said when he parked his car in the parking lot—now, I don't think—maybe you caught this: First he said southeast; he didn't make a mistake of it. And then it was southwest. Then he said that he walked across the street, and what did he do? When he was walking across the street he was walking where he should not be, or walking on a crosswalk, being as a lawabiding citizen for the rules of the road, citizens should be—if the cars were coming when he did that, maybe you would have a different situation here.

However, he went into this tavern; we don't know how long he was in there. And he comes out and immediately steps off the curb, and then he goes at a diagonal across the street. That is what he told you, that is what he testified to.

657 What does he say? I will repeat this to you: "I looked to the left and I saw a string of cars coming. I waited until they went by, and then I stepped out. I had to step fast. It's hard to get across. I didn't see her. I didn't see the car until the instant of the collision. I don't know where it came from. I didn't look to the right as I started to cross there."

Mr. Ozmon: Your Honor, I object to that as a gross misstatement of the evidence.

The Court: The jury heard the evidence. Proceed.

Mr. Kelly: It was, and I will answer that. When he had him on direct examination, which shows this entire character of this thing, he had him east ten feet away and he raised his arms up in the air. That wasn't what happened at all. How do you add that up to his sworn answer?

He admitted that he didn't see the car until the col-
658 lision. He stated that he didn't know where it came from, and that is what you need to decide this case on.

But in case any one of you may be taken off base by a glib argument, I point this out to you: When they started out this case, they knew at the outset that it is a case that should not have been filed. When the man violated the law and completely disregarded the rules of the road, and then there is a crosswalk to cross within 30 or 40 feet, and step out from behind a parked car and then sue for a sum of $50,000. Let me tell you, ladies and gentlemen, that I think it is ridiculous. I meant to point these things out to you, and that is why I have done it.

Now, let us take the rest of his testimony. After all, ladies and gentlemen, a fact is a fact. If you testify to the facts, you don't have to worry about any lawyer cross examining you. You can't cross examine the
659 truth. If you tell the facts you don't have to worry about something you said the day before yesterday because you will always remember the truth. You don't have to worry about anybody crossing you up, and there is no need for the opposing counsel or opposing lawyer to say to you, "Didn't you say this or didn't you say that under oath?" That is why I am

sure of her testimony as I saw her on the witness stand and as I heard the testimony. It isn't impeached in any way. She just told you the simple truth.

Take the plaintiff's testimony. There is no question that this man sustained some injury here, and the fact that I am sure that there are injuries in this case and that I talk about them is no indication that this lady is liable by any means.

Let us take, for instance, the rest of his testimony on the subject of the injury. I think it is reasonable to judge the rest of his testimony by the testimony about his injuries.

What did Dr. Scanlon say in this case? What did he testify to?

660 Well, if you recall, ladies and gentlemen, he said that there would be in his opinion no permanent disability. He said there might be a little pain because the muscles and the ligaments of the back have to adjust to it. There would be no permanent disability. And let me remind you that they could have brought on the orthopedic man. Dr. Scanlon knew what he was talkng about, and that is it. He said that the leg healed without any trouble. It was brought out that the weight-bearing bone, the shin bone, wasn't hurt at all, and that this bone, the outer bone, which you could almost do without, wasn't fractured, and it healed, and there was no disability whatsoever.

And Mr. Ozmon didn't try to claim that there was in his examination of this doctor.

Now, I ask you, what did the plaintiff testify to? What did he tell you in his testimony?

"I have pain." Then he went on to tell you, in addition to that, he went on and asked—he was testifying

here, and he told Mr. Ozmon, "I have pain all the time."

661 Then the question was asked of him, "Are you having pain right now?"

And his answer was "Yes, it is all the time, it is continuous."

And when he was talking about the brace, he said, "I only wear that brace about every two weeks, whenever I have any pain." And that is not true of the fact that he is having pain all the time; otherwise he would be wearing it all the time. So that is not true in answer to the question about the pain.

Now, if you recall, I asked him about his work. He said, "Whenever I am doing any lifting on the job I wear the brace. I anticipate it; I wear it." And then he tells us in the same breath there is no heavy lifting, that he can sit down and stand up and that there is no lifting at all, now, either one or the other is not true.

662 Now, ladies and gentlemen, that is the way I judge his testimony, and that is the way you can judge his testimony in applying this to the entire case. To get at the truth, there is no need for that, no need for it at all, if this man is telling the truth he doesn't have to say something in one breath and then in another say something else in another breath. Any man can be off on a few feet, but there is no need to go off on a tangent, and I say to you ladies and gentlemen, you can judge the entire case by that.

I would like you to look at these, speaking of the exhibits in this case, of these photographs which were taken here of the defendant's car. These were taken recently, and bear in mind they don't portray the con-

dition of that car as to dust and dirt. There was no disputing that the car was filthy. You will see here on the car, you will see the smooth front of that hood. There are no ridges there, as you can see by this photograph here. The front of it is smooth and the same way on the other side. One thing I would like to say to you, if this man had fallen off of that hood, going off the front, it is inconceivable there would not be
663 any dust marks here. It is unquestionable, it is inconceivable, or it would have brushed the dirt clean off this part of the car here. So I want you to keep that in mind, bear that in mind, if you will.

Now ladies and gentlemen, the Court will give you instructions and I want to talk to you about instructions at this time. The Court will tell you, he will tell you about—bear in mind that he will tell you that it is a—like a stepladder; that there are about four things the plaintiff must prove here. If he fails in any one of them at the end of the case, at the end of your deliberations you think that he has failed in any one of these, the plaintiff under the law cannot recover, and that is what you are here to do, to decide the issues in this case.

I know that you people have taken your duty seriously, as I can tell from your attitude, that you have
664 taken this case very seriously. You will if you are convinced in your mind that this plaintiff has not proven these things; you will follow the law.

Now, I wish to say to you that he must prove that he was in the exercise of due care and caution for his own safety, as it is due care and caution to walk across the street, across a crosswalk, and to go down the street 50 to 60 feet from the intersection, and walk

out at a rapid pace at a diagonal, out from behind a passing car and get hit, and then walk into the side of that car. Either way, if that is due care and caution, then I say to you ladies and gentlemen I have never seen due care and caution in all the cases that I have seen. I have not seen it, if that is it.

Now, the next step is that the defendant was negligent, and her negligence was the proximate cause of
665 the occurrence. He must prove that. Remember that. Now put yourself in the position of Judith here, who almost had a mental block, and ask yourselves if there is anything that she should have done that she didn't do with cars coming toward her and with a man stepping out from behind the passing automobile, and then they must prove that he suffered damages, and that which approximately resulted from the occurrence in question. If he fails in any one of these he can't recover.

Bear in mind that they have to prove negligence on her part, and I think in your good conscience, when you consider there is nothing she could have done different: we are all driving on a street, that is why we have rules and crosswalks, for the people to use them.

Do you remember that she said that there was nobody on the crosswalk when she made the turn, and started down the street, and here pops this man up. They apply for both sides, for the plaintiff and for the defendant. If you are convinced in your mind that
666 there was nothing she could have done or that which she didn't do, they can't hang speed on her, no lights, no horn on her.

My goodness gracious, if that woman should have blown a horn when the man popped out, then every

time you turn the corner you had better blow your horn, and that is ridiculous.

Now, let me tell you, they make a point about implying that her reflexes were not fast enough. If she didn't stop when she did, how did it happen the way it did? How in the name of common sense was he noticed there? If you think that that woman should have blown her horn under these circumstances there, with the string of cars approaching her, and the last car going by her, and then a man steps out from behind a parked car, then I say to you we had better keep our horn on all the time. You had better have a lookout in the left front of your window watching for people to go out there.

667 Now, I think I have summarized the evidence in this case as best I can, and I ask you when you deliberate in this case that you bring in a verdict of not guilty and find the issues for the defendant and against the plaintiff. And I might remind you that the Court will tell you that you have no occasion to consider the question of damages at all unless she is legally liable.

Thank you very much ladies and gentlemen. If there is anything that I have left out, I know that the Court will give you an interrogatory, "was the plaintiff Edward Bruske in the exercise for his own safety before and at the time of the occurrence?"

And you must all answer that; you must sign it. You must write the word yes or no. Thank you.

RESPONDENT'S APPENDIX C

38 TRANSCRIPT of a statement made by Judith A. Arnold, taken at her place of residence, 921 Rock Street, Peru, Illinois, on Tuesday, August 30th, 1966, upon the interrogatories propounded by Mr. Cy Couet.

Reported by Raymond R. Estridge, for Mr. Harry O. Nottingham, Inc.

* * * * *

Mr. Couet: Are you Mrs. Arnold?

Mrs. Arnold: Yes.

Mr. Couet: My name is Mr. Couet, and this is about the accident that happened on January 3rd, 1965, at Fourth street and Schuyler. Do you remember the incident?

A. Yes.

Q. There are some things we don't have answers to. At the time this happened it was on a Sunday, it was dry out, but winter time, January 3rd. This man was crossing from the north side of the street to the south side.

A. Yes.

39 Q. Your automobile had been moving north on Schuyler, and east on Fourth street?

A. Yes.

Q. The obstructions at that time, if any, could have been cars if there were any parked along the curbing, or cars parked in the Dairy Barn at the corner, the southeast corner where the parking area is. We have asked the witnesses to tell us if they can what was in the parking lot. Do you recall what was in the parking lot?

A. There were quite a few cars. I can remember that, and I know when I went out the west entrance

of the parking lot, there was one coming out of the north entrance.

Q. On to Fourth?

A. And I quickly glanced to see if he was going to stop and he had already gone out of the parking lot.

Q. When you got to Fourth on Schuyler there is a stop sign?

A. Yes, I stopped, and I was going to go east, and I looked to see what he was doing, and he had already gone ahead of me, and when I pulled on to Fourth and as I did I hit him.

40 Q. How about traffic coming on Fourth, was there any at that time?

A. No.

Q. You were clear to make your turn?

A. Yes.

Q. How far from the crosswalk, I don't know how those lines were at the time, whether those pedestrian lines were there at the time, but using that as the point, the crosswalk lines going across the street on the east side of Schuyler, how far would you estimate your car moved before contact with the man?

A. Before the driveway.

Q. That driveway the man had come out on?

A. Yes.

Q. There is a sidewalk and a break where the driveway came out along there?

A. Yes, my headlights were right even with the driveway.

Q. Were the street lights on at that time?

A. Yes, because it was clear, I could see.

Q. It was in the evening, your headlights were on, and the street lights were on?

A. I am sure they were on.

41 Q. Did they light up pretty bright at the time?

A. Yes, those lights it is like a neon light at the time. It seemed to me like they got dimmer later on in the evening. At this time they were quite bright like a neon light.

Q. Was this man crossing straight across the street?

A. No, diagonally, and he hit on the corner of my car.

Q. From north to south, or southeast?

A. Yes.

Q. When I asked the Captain where in relation to the center line was the car and the man when they arrived there, to see where they were in the position, he mentioned about the middle of the driving lane.

A. Yes, he was over the center line.

Q. How far would you put it in feet, five or six feet, a couple of steps?

A. About three feet.

Q. Did you notice him at all?

A. No, I never did see the man until I hit.

42 Q. What kind of clothing do you recall seeing on him?

A. He had on a brown jacket, whether it was suede or cloth, I don't remember.

Q. Dark or light?

A. Dark brown.

Q. Trousers?

A. I would say they were brown dress slacks.

Q. Did he have a cap or hat on or anything?

A. No.

Q. His clothing more or less was on the dark side?

A. Yes.

[RESPONDENT'S APPENDIX C]

Q. At the time your attention was attracted to the car on your right?

A. Yes, the first time I saw the man he was already hitting the windshield.

Q. Did he actually come up to the windshield, do you know?

A. Yes.

Q. And then rolled forward and off?

A. To the side.

Q. Left front of the car?

43 A. He started to get up and a pedestrian came over and pushed him back down, and told him to lay back down.

Q. Traffic was piled up at this time?

A. Yes, everybody was there.

Q. Streets were dry, there was no snow or anything at the time?

A. No.

Q. The wipers weren't on, they weren't needed, the windshield was dry?

A. Yes.

Q. Did he say anythng while laying on the ground?

A. No, not until after the police had come. When they first came over, when he started to get up he said he felt fine, he was all right, and then when they made him lay down he said his leg did hurt.

Q. The initial point of contact with the automobile would be about where?

A. Right close to the headlights, he would have hit my bumper, about his knee.

Q. The headlight and the bumper?

A. Yes, right on the edge of it.

44 Q. And came on to the hood toward your windshield?

A. Yes.

Q. There was no sound of anything prior to this to warn you?

A. No, nothing until he hit the hood of the car.

Q. You headlights are normal, they are bright enough?

A. Yes.

Q. The parking lights wouldn't show anything, but the headlights were on?

A. Yes.

Q. Cars parked on the street?

A. Yes, both sides.

Q. Parking is up to the driveway, I believe, on the street there?

A. Yes, there was one car between the corner and the driveway.

Q. Was there a car there?

A. Yes.

Q. On the south curb?

A. Yes, and the north curb was completely f ll.

Q. The theater is operating, and that is where most of them are from, and the Dairy Barn?

A. I think most of the cars parked there were from the show. I think it was full when I went into the Dairy Barn.

Q. The lot itself was quite full?

A. Yes, I usually park in the front, not where I back out into Fourth street.

Q. When you made the turn from Schuyler on to Fourth, you didn't see him?

A. No.

Q. Was he carrying anything at that time?

A. He had nothing in his hand.

[RESPONDENT'S APPENDIX C]

Q. How about back, right behind there, would it be that would sort of help blend in the objects in the background on the north side?

A. Let's see, the first building on the corner is a tavern, and there is a dairy and a store, and I think there is a—

Q. Hardware store next to the tavern.

A. And then like a double building it had at one time been a store.

Q. Were they all lit up at that time, had lights on them?

46 A. Not there, there is a big open driveway for the apartment.

Q. I asked the Captain and he said it was a common thing for people to cross the streets other than the corners?

A. Yes.

Q. There are crosswalk lines indicated, and there is no enforcement?

A. Yes.

Q. Your windshield was clear at the time, there was no obstruction?

A. No, no snow or nothing there.

Q. No stickers in your windshield?

A. The car is the same as it is now, nothing new has been added.

Q. That isn't an automatic shift?

A. Yes.

Q. Are you in automatic as you are going around?

A. Yes.

Q. That would be in low, the other words—

A. I don't think the speedometer was registering ten miles an hour.

[RESPONDENT'S APPENDIX C]

Q. You had stopped there at the corner?

47 A. Yes, I had come to a complete stop, and had waited for several cars to pass, and there was a break in traffic.

Q. There were no cars coming?

A. At least four or five blocks back.

Q. Plenty of time, and you were in no hurry?

A. No.

Q. Ten miles an hour as close as you can come?

A. Yes.

Q. The first indication was the sound of him hitting?

A. Yes.

Q. How far did you travel after striking him?

A. You mean after I hit him?

Q. Yes.

A. Immediately, I wasn't going fast enough, and I hit the brake.

Q. There was no skidding, you stopped right there?

A. Yes, it threw my little boy forward.

Q. Was he in the front seat?

A. Yes.

48 Q. Did he get hurt?

A. No, he bumped his head.

Q. You don't wear glasses?

A. No.

Q. The car you are familiar with, have you driven it before?

A. Yes.

Q. I am trying to think of something that might have obstructed your vision. Your car was the car

that came out of the lot first, and you made sure he had cleared?

A. He had gone, his taillights were almost on to Fourth street when I started to turn slowly.

Q. What object was your eyes on, what was your concentration on at that time?

A. Oh, I can't remember really.

Q. There were no other people crossing?

A. No, I had looked on the other side of the street, and it was dark over there, and I could see the parked cars there, and there were several people up by the show there.

Q. You noticed it as you were making your turn?

49 A. Yes, I tried to look both ways because of that, and I had no recollection of anyone standing close to the curb, even start across the street. The only thing I could think of that might have diverted my eyes was to see if I had cleared the car that was parked there.

Q. You heard no sound prior to then at all?

A. No, my radio wasn't on.

Q. Were there any windows open?

A. My vent windows.

Q. Was the heater on?

A. No, I don't think I had the heater on that night just to go the three blocks.

Q. It wasn't a bitter cold night?

A. No, and we both had winter coats on.

Q. There was no traffic moving westward at this time causing a glare of headlights? There was no traffic coming the other way?

A. I feel like if there was traffic coming the other way I would have waited. As I remember the street was practically all mine.

Q. Deserted at that time?

A. Yes.

50 Q. From the time you made your turn until this happened there were no cars moving either way?

A. I got out of the car and got up to him before any cars came near us.

Q. This was afterwards?

A. Yes.

Q. Is that Dairy lit up pretty well? Does that light up that lot at the corner?

A. No, the parking lot is fairly dark. It wasn't a bright light. He dropped out of the blue it seemed to me.

Q. At the time this occurred you were feeling okay?

A. Yes.

Q. Your boy didn't distract you?

A. No, he was opening bubble gum.

Q. Do you do a lot of driving?

A. Yes, I always have.

Q. You were in your proper lane at the time?

A. Yes.

Q. And the parking spaces were all occupied on the street?

A. Yes.

51 Q. This was because of the show?

A. Yes, it was right at the time when the first show is starting and everybody was going.

Mr. Couet: Thank you, that is all.

(End of Statement)